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ABSTRACT

This Report of the Conference on Public Service Equalization Litigation, held during May 1974, is organized into nine sections. Section One, Public Service Equalization, notes that two major problems that are almost invariably encountered in public service litigation cases are the factual complexity of the cases themselves and the financial limitations of local governments. Section Two, The Current Scene, discusses the activities of such groups as the NAACP Legal Defense Fund, Inc., Mexican American Legal Defense and Educational Fund, Lawyers' Committee for Civil Rights Under Law, the UCLA Institute of Government and Public Affairs, and the American Civil Liberties Union, South Texas project. Sections Three through Nine deal with the educational parallel, legal problems and strategies, inter-governmental remedies, strategic priorities, and an action agenda, respectively. Also included are four appendixes. Appendix A lists Documentary Resources available for Recording and Evaluating Disparities in the Provision of Municipal Facilities. Appendix B is a copy of Court Order in "Hawkins vs. Town of Shaw". Appendix C is a Bibliography on the Evaluation and Delivery of Municipal Services. Appendix D lists Non-legal Organizations active in Public Service Equalization. (JM)

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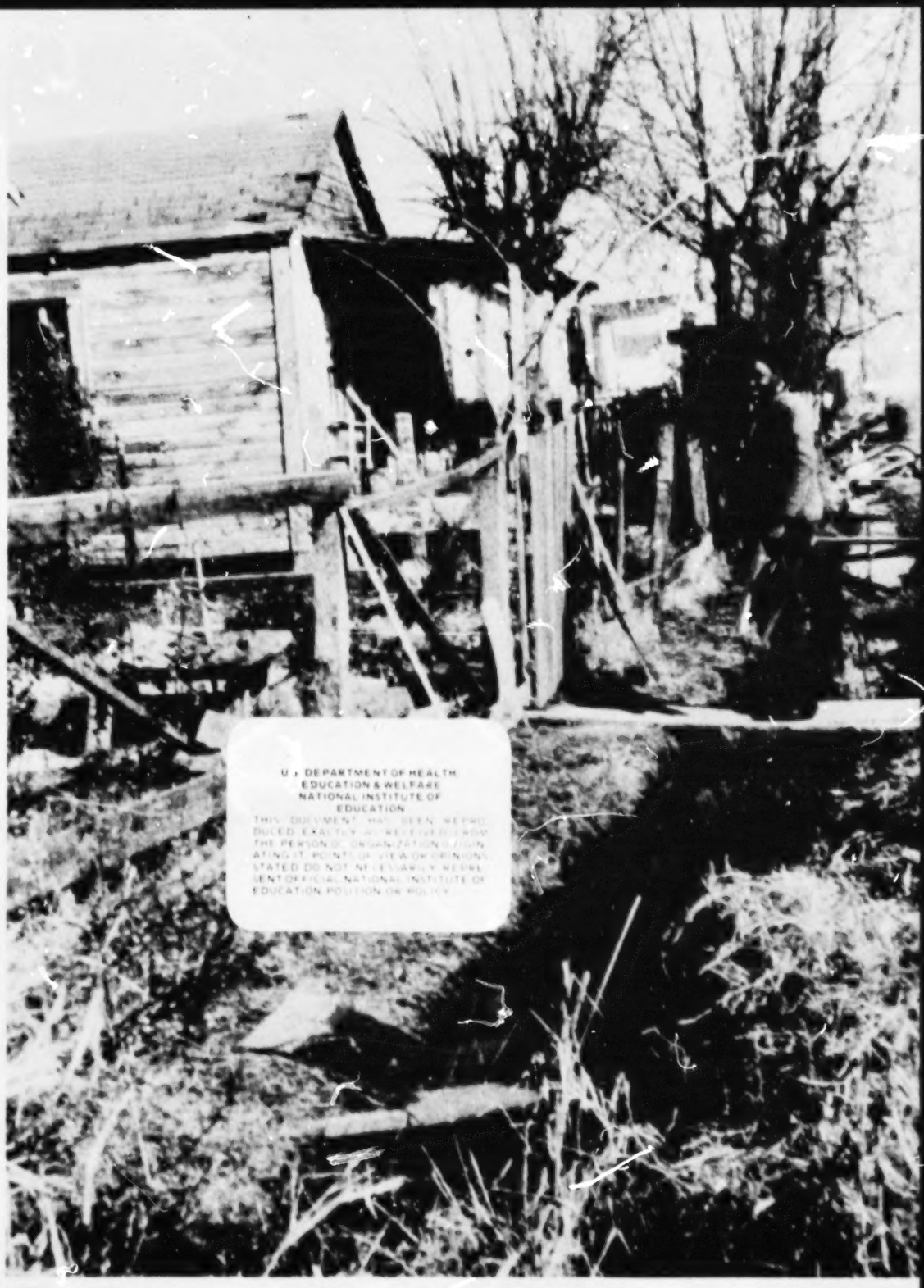

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the next step:

Toward Equality of Public Service

UD 015094

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THE NEXT STEP: TOWARD EQUALITY OF PUBLIC SERVICE

Report of the Conference on Public Service
Equalization Litigation,
May 16-17, 1974, Trinity Parish, New York City
Sponsored jointly by The Ford Foundation,
The Irwin-Sweeney-Miller Foundation and
Trinity Parish

"In my opinion, no one institution, no one nation, no one company, no one profession, no particular name brand of religion, no individual is capable, all alone, of coping with the basic problems and opportunities of this last quarter of the Twentieth Century."

The Rev. Dr. Robert Ray Parks,
Rector of Trinity Parish,
May 16, 1974

UD 015094

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Public Service Equalization

Water demand peaks after supper in Shaw, Mississippi, when folks are washing up. In one part of town, the white part, water flows freely from the taps. But where black families live, it used to just trickle out of the spigots. There were bigger water mains and more water pressure in the white neighborhoods, and that is where one found most of the paved streets and the new street lights. Nearly every white home was linked up to a sanitary sewer, while one out of five black homes was not. The fact that black families were being short-changed on municipal services was pretty clear-cut in Shaw — and the situation is not unique. There are poor sections of Birmingham, Alabama, that have no public water supply today. Nor is there any safe drinking water for Mexican-American farm workers whose homes are surrounded by — but not within — the city of McAllen, Texas. A water main runs right by the community, but the only time any water reaches the houses is when the area floods after a heavy rain.

Safe drinking water, adequate water pressure, drainage ditches, sewers, street lighting, paving, parks, police and fire protection — these are basic public services (and far less complicated issues than housing, health care, education or social services). They are provided by a variety of political subdivisions — cities, townships, counties, special districts — and financed in a number of different ways — by general state revenues, local property taxes and special assessments. But, throughout the nation, inequities are common. Public services in poorer neighborhoods are often markedly inferior to public services in more affluent ones.

In January, 1972, the Federal Court of Appeals for the Fifth Circuit determined that conditions in the town of Shaw violated the equal protection clause of the Fourteenth Amendment and ordered local officials to undertake improvements "that will, within a reasonable time, remove the disparities that bear so heavily upon the black citizens of Shaw." The decision in *Hawkins v. Town of Shaw*, subsequently upheld by the entire Fifth Circuit bench, climaxed six years of litigation by the NAACP Legal Defense Fund.

The judgment in *Shaw* was widely hailed as the public service equivalent of the Legal Defense Fund's 1954 victory over school segregation in *Brown v. Board of Education*. In his concurring opinion, Judge Wisdom stated, "By our decision in this case we recognize the right of every citizen regardless of race to equal municipal services," suggesting that *Shaw* was only the first in a host of similar suits. But although municipal authorities have not rushed into action and voluntarily eliminated disparities in public service, there has been no great wave of litigation compelling them to do so. One reason is the legal limitations of the *Shaw* decision; another, the practical difficulties of equalization suits.

During the past two decades, federal courts have struck down barriers to equal rights in a great many cases. The primary legal instrument that elicited these decisions was the Fourteenth Amendment's equal protection guarantee, prohibiting unreasonable discrimination between different groups of individuals. Not all discrimination, however, is deemed "unreasonable" by the federal courts. To be covered by the equal protection clause, discrimination must be racial in nature or involve some fundamental right, and fundamental rights are generally intangible: the right to vote is fundamental; the right to an education is not. When discrimination fits neither of these measures, federal courts are sympathetic to defenses that show some rational basis for the discrepancy, such as the limitations of local tax structures or the priorities of local government. (However, these arguments will not excuse the absolute denial of a service to one group that is provided to another.) The right to public services is not considered fundamental, and the *Shaw* opinion specifically warns that "we do not imply or suggest that every disparity of services between citizens of a town or city creates a right of access to the federal courts for redress." Equal protection suits, therefore, are most likely to succeed where the discrimination is racial, as it was in the *Shaw* case.

But the Fourteenth Amendment is not the only basis upon which discrimination in the delivery of public services can be challenged in the federal courts. Both the General Revenue Sharing Act of 1973 and the Civil Rights Act of 1964 bar racial discrimination by the recipients of federal grants. In addition, revenue sharing funds may be used to correct conditions caused by discriminatory practices.

State courts are also a route to public service equalization. When a state undertakes either a general constitutional obligation or makes specific provision in its statutes for some kind of service, then denial of that service or inadequate provision of that service can constitute grounds for litigation. For example, the New Jersey Supreme Court has interpreted that state's constitutional mandate of a "thorough and efficient" education as the basis for requiring changes in the entire school system, including a more rational scheme for school finance *(Robinson v. Cahill)*. Cases based upon state constitutional or statutory guarantees of service could challenge *all* instances of discrimination, not only those based upon race.

The two major problems that are almost invariably encountered in the course of public service litigation are the factual complexity of the cases themselves and the financial limitations of local governments. To establish the existence of a significant disparity in services takes more than mere legwork. While it doesn't require a city planner or engineer to count street lights and fire hydrants or to determine if a street is paved, professionals are often needed to figure out what is going on underground with sewage lines, water mains and the like. Much of the data necessary to the plaintiff's case is in the hands of local authorities and often is difficult to obtain (other than through pretrial discovery). The obvious obstacles to surveying services in larger communities combined with lack of racially distinct neighborhoods, have resulted, thus far, in few cases being brought against big city governments.

Limitations of public financing, the second major problem in equalization litigation, have already been the basis for negative decisions. For example, many communities delegate the responsibility for financing public services to the home owner, relying upon special assessments to finance such capital undertakings as paving streets and laying water mains or sewage lines. Such services are available only to those neighborhoods in which homeowners are able and willing to pay for the improvements. In several decisions, the courts have refused to interfere with this approach and have held it to be a form of local decision-making (even though those areas with residents unable to pay the assessment have, in reality, no decision to make). To correct these situations would mean challenging the means of financing public services, and this is an area into which the courts have been historically reluctant to intrude. As the U.S. Supreme Court noted in deciding *San Antonio School District v. Rodriguez:* "The Justices of this Court lack both the expertise and the familiarity with local problems so necessary to the making of wise decisions with respect to the raising and disposition of public revenues."

Because of the difficulties involved in equalization litigation and the obvious effectiveness of political action directed toward those same ends, a major legal strategy for compelling state and local governments to allocate more of their resources to areas of sub-standard services is to increase representation from under-served areas on the policy-making bodies that determine local expenditures. By challenging multi-member districts and at-large elections (under the priniciple of equal political representation as defined by the U.S. Supreme Court in *Baker v. Carr)*, civil rights groups have been able to increase the number of state legislators, city councilmen, school board members and members of special district boards coming from minority communities and poorer neighborhoods.

Today, the future of public service equalization is uncertain. The limits of litigation are undefined. There have been surprisingly few sequels to *Shaw*, and still fewer attempts to employ alternative legal strategies. Basic questions remain unanswered. What, for example, is the proper standard for equal service? Is it equality of cost, condition or service? Should discrepancies in services be sought only within individual towns or cities and not among them? Can the cause of equalization be best served through litigation or through political action?

Recognizing the need for a discussion of these issues, the sponsors of the Trinity Parish Conference on Public Service Equalization Litigation brought together lawyers, planners and other professionals in the field for the purpose of sharing information, identifying priorities and considering long-term goals. It was their hope that the conference would result in a more coherent view of the equalization movement and possibly produce some mechanism to help guide its growth.

The Current Scene

At the initial conference session, participants described their own or their organization's present activities and plans in the area of public service equalization. (As elsewhere in the report, papers submitted by participants have been condensed and edited and discussion summarized.)

NAACP LEGAL DE[illegible] FUND, INC. (LDF)

Representing the Fu[illegible] Gray and Charles Williams stressed the group's int[illegible]nding the precedent in Hawkins v. Town of Shaw *[illegible]g similar suits and focusing on liti[illegible]tion to corre[illegible] inequities in larger cities. While concerned by th[illegible] of cases that have resulted from the* Shaw *decision, the Fund recognizes the problems of such suits. "*Shaw *had beautiful facts," said Charles Williams, discussing the difficulties of locating parallel situations. "The places are there, but we've had trouble with the ones suggested to us. We hear from places where there are the most active community people. But places with the most active people may not be the best places to bring suit."*

Since winning the *en banc* decision in *Hawkins v. Town of Shaw*, the LDF has been working to increase the number of cases in the area of municipal services equalization in order, on one hand, to secure the importance of the victory in *Shaw* and, on the other, to expand the scope of the law in this area. The number of cases brought to date, however, has not been anywhere near what one would hope or expect.

The LDF's commitment in this area is based in large part on the substantial improvements in living conditions that have occurred in *Shaw* as a result of the litigation. The town has been busy implementing an equalization plan and following a time schedule imposed by the court in June of 1973 which required the town to:

a. install all new street lights by March, 1974;
b. make additions to the water and sanitary sewer systems and install new fire hydrants by July, 1975;
c. make improvements in the storm sewer system by September, 1975;
d. pave all the streets and make any other improvements by June, 1976.

At present all the street lights are in place. Additions to the water and sanitary sewer systems and fire hydrant network should be finished within the next six or seven months, ahead of schedule, after which pa[illegible] will be completed. The town is presently financing these improvements with cash surpluses that predate the suit and federal revenue sharing funds, but it may have to float bond issues to pay for the final items.

Because of its landmark nature and the costs of two appeals, *Shaw* has been quite costly both in money and lawyers' time. During the case's seven-year history, the Fund has spent more than $100,000 on litigation. However, the decision has meant more than $500,000 in improvements for the 1,500 black residents of Shaw where the total population is less than 3,000.

CURRENT LITIGATION

LDF has brought three other municipal services suits to date.

In Mississippi, *Harris v. Town of Itta Bena* was filed at the same time as *Shaw*, raising more or less identical issues, against a town very similar to Shaw. Because of the similarity between the two cases, the parties in *Itta Bena* agreed to a continuance of the case pending the outcome in *Shaw*. Following the Fifth Circuit's decision in *Shaw*, a consent decree was entered stipulating that certain disparities existed and ordering the defendants to develop an equalization plan which is now being implemented. The only significant difference between the *Itta Bena* order and that in *Shaw* was that the defendants were required to issue at least $285,000 worth of negotiable bonds to help finance the $500,000 worth of improvements required.

In Florida, *Davis v. City of Sanford* was settled before trial when the city agreed to apply all of its revenue sharing funds, more than a million dollars, to the paving of streets. Because of the settlement, it was not necessary to confront the question of special assessments raised in this case.

In Tennessee, *Dupree v. City of Chattanooga* was originally brought to challenge the absorption of an independent Model Neighborhood Program into a consolidated program. The disparity in municipal services and facilities was raised as an adjunct issue. Subsequently, however, the two issues were separated, and the services case is to be tried this fall.

PROSPECTIVE LDF SUITS

LDF has also been contemplating bringing suit against five municipalities in Mississippi and the City of Mobile, Alabama.

The most potentially significant of the five Mississippi cases is a suit being contemplated against the City of Jackson. Because of its large size (the population is more than 150,000 residents), a different method of proof from the direct observation technique utilized in *Shaw* is required. A statistical survey is now being developed and if it indicates that provable disparities exist, suit will be brought.

The four other Mississippi cases are in towns that more approximate the situation in *Shaw*, with populations ranging from 1,000 to 6,000. These cases have been developed in conjunction with workers from Mississippi Action for Community Education (MACE) using the McTeer-Lipman "Community Manual" developed by two Mississippi attorneys. With this manual, local residents in a small town can independently document sufficient disparities to convince a lawyer that there is a basis for bringing a successful lawsuit. Since the law in *Shaw* is now clearly established, the small size of several of these towns may make it possible to authenticate the locally documented disparities through pre-trial discovery and stipulations and then to move for summary judgment.

Finally, last fall, LDF contemplated bringing suit against the City of Mobile primarily on behalf of black residents living along a tributary known as the Three-Mile Creek. The city had failed to make certain improvements in the creek's channel that a study it had commissioned showed necessary before paving and satisfactory storm drainage could be provided. The city had, however, performed similar work along a tributary in a white section of the city. This meant that, despite the city's large population, there was one issue upon which a successful suit could be initiated without the necessity of a statistical survey. Because there was also a question as to discrimination in using federal revenue sharing funds, suit was delayed pending exhaustion of administrative remedies under the Revenue Sharing Act. It now appears that the city may comply without further legal action.

PROBLEMS ENCOUNTERED IN EXPANDING UPON SHAW

LDF is interested both in seeing more equalization suits brought and in broadening the scope of the *Shaw* precedent. Because of the clear need to avoid bad precedent, at this point suits should be brought only when there is a good chance of success. However, a number of problems has made achievement of these goals difficult.

First, there has been some confusion among community people as to what *Shaw* means. Local residents in many places where the possibility of a *Hawkins v. Shaw* type suit clearly exists are apparently unaware of the feasibility of legal recourse; while in others, where municipal services disparities are believed to exist, it has turned out that people were really concerned with other problems, such as municipal employment discrimination or discriminatory incorporation.

Second, lawyers in the field have had difficulty in recognizing, analyzing and preparing the legally and factually complex municipal service suit. Jonathan Shapiro, the LDF staff attorney who worked on *Shaw*, has recently prepared a litigation manual that is being distributed to the Fund's cooperating attorneys and other interested organizations and individuals. In addition to a detailed exegesis of the *Shaw* case (including the pleadings, briefs, opinions and orders), the 416-page manual also includes Professor Michelman's treatise on "Obtaining a Fair Share of Municipal Services Through Legal Proceedings" and the McTeer-Lipman community manual being used in Mississippi.

A final problem has been resources. Given the present uncertainties in the field, it has been more time-consuming and costly to locate, identify and investigate possible suits than it should be, once these initial difficulties have been resolved.

INVESTIGATION, IDENTIFICATION AND ANALYSIS OF EQUALIZATION SUITS

When responding to a complaint of municipal service disparities, LDF attempts informally to collect data on the community and the services in question and then to have one of its staff attorneys visit the site, accompanied by Yale Rabin, the Fund's city planning consultant.

The initial analysis is done by making a visual comparison of black and white neighborhoods and through discussions with the community residents. One difficulty of a visual comparison is that the more subtle differences in services and facilities (*e.g.* size of water mains and sewer mains) are lost. On the other hand, such disparities can only be easily unearthed by discovery during litigation or by verifying community complaints of pressure or capacity, through local records. In smaller cities and towns, it may be possible for para-legal or community volunteers to gather sufficient information for an initial determination if they are provided with clear guidelines like those in the McTeer-Lipman community manual.

The size of the city or town is a major consideration in determining the method of proof. In a town of 2,000 people, 500 homes and 15 miles of streets, one could determine by direct observation the existence or absence of every service in question. Having done so, one could then, through discovery, require the city to produce maps, documents and responses to interrogatories detailing the location and quality of these services. Requests for admission based on the responses would demonstrate the disparity. If these are admitted, summary judgment could be sought based upon *Shaw*.

In larger cities of 50,000 or more, however, it is extremely difficult to make an actual survey of each service and, therefore, a different approach is needed. One such approach is to limit the number of services at issue by focusing on a specific item such as trash collection, fire protection or water system adequacy. In Mobile, for example, the major issue was drainage improvements along a tributary running through the black and poor communities. A second approach would be to undertake a statistical survey using a sampling technique for the measurement of service levels in white and black neighborhoods. For the first suit of this kind, however, it may be necessary to complete a full street-by-street study in order to validate the sampling technique.

FUTURE LITIGATION EFFORTS

LDF is deeply committed to seeing that the precedential value of *Shaw* is used to correct those disparities in services and facilities which exist throughout the country. We expect that the new suits to be filed in Mississippi, plus the distribution and use of the litigation manual, will stimulate greater demand for assistance and litigation. During the past year, LDF has been particularly interested in identifying larger cities with significant minority group communities where the conditions appropriate for equalization suits are present.

MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND (MALDEF)

Vilma Martinez, general counsel of MALDEF, told the conference that the organization's major efforts, until now, have been focused on education where the problem has been to prove de facto *segregation and to seek "different" treatment rather than "equal treatment," with the goal of securing bilingual and bicultural education for Mexican-American students. Rather than approach the issue of public service equalization by bringing* Shaw*-type actions, MALDEF has concentrated on increasing the political representation of residents in under-served areas by challenging multi-member districts and at-large elections. "What happens when there are multi-member districts and at-large elections," she said, "is that four or five rich people, who are often neighbors and all of whom come from the same part of town, become the city council."*

Sanford Jay Rosen, legal director of MALDEF, noted that the group was involved in several cases where the aim was to reduce rather than increase the level of certain municipal services. He cited "over-saturation of minority areas with police" as one example. In Los Angeles, MALDEF is challenging a lighting district's special assessment for a group that does not want mercury vapor lights and the bill that comes with them.

Recently, George Korbel of MALDEF traveled to ten of the major urban areas in Texas and Arizona to develop evidence for political access suits. The schemata of proof in this type of litigation centers at least partially around a social analysis of the conditions of Mexican Americans, blacks and other minorities, and the relationship between substandard or inequitable conditions and voting patterns. In each of the urban areas examined, similar factual patterns emerged:

a. There tends to be minimal or no code enforcement in minority areas.

b. With notable exceptions in El Paso, Texas, most public housing projects are poorly designed and so located as to intensify patterns of school segregation.

c. There is an absence of curbs and gutters in minority areas. (The exception to this seems to be Waco, Texas.) Consistently, minority areas surveyed contained sizable areas in which residences lacked any plumbing facilities.

d. An excess of police activity in minority areas disproportionate to community needs and often hostile to the community itself was noted in each county.

e. Parks are rarely found in minority areas; where they exist, they are poorly maintained. (In San Antonio, the City Planning Department says that the *barrio* needs at least 30 community parks – there are none; at least 67 sports fields – there are 17; at least 40 tennis courts – there are five; at least eight swimming pools – there are five; and "adequate gymnasium facilities" – there are none.)

f. Flood conditions exist in minority areas due to poor drainage and inadequate or non-existent storm sewers. (In at least one city there is also frequent back-up of sanitary systems, which results in raw sewage flowing down flooded roads.)

g. Complaints about discriminatory service in garbage pickup are common.

h. In cities where municipal power systems exist, there are frequent complaints about discriminatory maintenance and improvement. Under storm conditions, minority areas are often without service for substantial periods of time.

i. Systematically, new public facilities, universities, hospitals and office buildings are sited discriminatedly.

j. Freeways have isolated downtown areas from areas of minority concentration. They also have destroyed viable neighborhoods that led to disintegration of minority social fabric in these areas.

k. In many places, notably the area along the course of the Rio Grande, various mechanisms of special interest government units (*i.e.*, water districts) result in unequal distribution of water. Potable drinking water is unavailable to large numbers of Chicanos in some places; in others, they are denied equal access to water for irrigation and other non-domestic uses.

The indirect effects of these conditions, such as the diseases that result from lack of proper drainage, can be as damaging as the deprivations themselves. The inequitable distribution of public services has encouraged not only "white flight" but also caused successful minority residents to leave minority areas, depriving the community of its middle class and the small businesses they support.

MALDEF feels that there has been a complete lack of city planning in the interest of minority communities. Planning for southwestern cities has encouraged unbridled growth to the advantage of the Anglo community. In San Antonio, almost all development occurs north of the city, where Anglos concentrate. City policies encourage this growth and the *barrio* is effectively taxed to support it. The city's power plants and sewage systems are located in the minority areas. The cost of providing these services rises as the distance from the plant increases; nevertheless, the same rates apply to all. Hence, the typical regressive rate structure (*i.e.*, the more you use, the cheaper the overall cost) results in encouraging usage at the highest cost and in the highest income areas. Also, the limited money available for utility improvement and construction typically is spent for extensions into new Anglo subdivisions rather than for improvements to existing systems, although flooding and sewer back-up problems in minority areas are driving out those who can afford to leave.

None of the cities surveyed by MALDEF demonstrated with any clarity the *Town of Shaw* type of proof. Indeed, in some places, substantial numbers of Spanish-surnamed people belong to the economic and political power structures. Further, application of Model Cities money has produced real garden areas in a number of the most concentrated *barrios*. To protect poor Chicanos in the Southwest may require the extension of the *Town of Shaw* principle beyond race and ethnic discrimination to economic class discrimination. MALDEF plans to attempt this extension with great care, and will also continue to look for more classical *Town of Shaw* fact patterns.

While seeking additional resources to research and mount direct equalization lawsuits, MALDEF is proceeding to develop alternative litigation strategies. For example, the Fund is employing the principle of equal political representation, adopted by the Supreme Court in *White v. Register*, (412 U.S. 755 (1973)), to require the election of city councilmen, school board members and special district board members, by single member geographic district. Successfully challenging multi-member legislative districts and the at-large election of local council and board members should increase minority group representation on policy-making bodies and render them more responsive to minority needs in the allocation of municipal and other services. The impact of *White v. Register* on the Texas Legislature has already had such an effect.

The MALDEF strategy for treating the municipal services problem indirectly also includes litigation designed to require local and state government to increase spending for programs that will directly benefit Chicanos. For example, the Fund's educational litigation is primarily aimed at persuading courts, state education departments, and other governmental bodies to require the offering of substantial bilingual-multicultural programs, as well as to engage in affirmative recruitment and hiring of Chicano personnel.

In addition, employment discrimination by state and municipal government is being systematically challenged. By requiring city and state governments to approach parity for minorities at all levels in the civil services, MALDEF hopes to see these minority employees, individually and thorough mutual assistance associations, add to the pressure for equalization of services to their communities. MALDEF and other civil rights organizations have found that when minority personnel are recruited in numbers into uniform services, especially police departments, these public employees bring considerable pressure within their services to assure proper treatment of minority neighborhoods and persons. For example, Chicano police officers begin to make it very clear to their colleagues, Chicano or otherwise, that unbridled violence within the *barrios* and directed toward Chicanos is not to be tolerated. Second, MALDEF has been representing Chicano employees in negotiations with the Pacific Telephone Company. During the course of these negotiations, one of the issues that the Chicano employees identified concerned the failure of the company to provide bilingual and multi-lingual emergency services.

The company is now moving to provide such services. In other words, a person who speaks only Spanish will now be able to reach an operator who can assist him during the course of any emergency.

LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW (LCCRUL)

The Lawyers' Committee's major effort in the direction of public services equalization is its Revenue Sharing Project. According to Harold Himmelman, "It was our judgment that revenue sharing gave us a new handle on monitoring the expenditure of federal funds by state and local governments in a broad sphere." Specifically, the Committee is concerned with expenditures for services "as they affect minorities vis-à-vis white populations."

Although local governments may only allocate revenue sharing funds to projects in the "priority expenditure" categories, these categories have been so broadly enumerated by Congress that, with few exceptions (notably support for school busing), local governments are free to spend as they choose. But, while revenue sharing is invariably labelled as "no strings" federal aid, the legislation contains a number of specific prohibitions and preconditions to the use of funds, including the requirement of civil rights compliance. In addition, a detailed compliance procedure is set forth in the statute and implementing regulations. (See 12 U.S.C.A. § 1221, *et. seq.)*

The Committe's Revenue Sharing Project has two federal court actions pending. Robinson v. Shultz *alleges violation of the Revenue Sharing Act by the Treasury Department in its failure to initiate formal enforcement proceedings against Chicago as a result of apparent discrimination in the Chicago Police Department. (The Department receives about 75% of the city's revenue sharing payments.)* City of Newark v. Shultz *was filed after the Treasury Department refused to grant Newark's petition for a revision of the 1970 Census data used in allocating revenue sharing funds. (The Census Bureau has admitted a 7.7% undercount of black Americans in its 1970 study, an error which costs Newark some $400,000 in revenue sharing funds each year.)*

In a related development, the LCCRUL also has filed a formal administrative complaint against the town of Montclair, New Jersey, alleging discrimination in the employment practices of the town's Police and Fire Departments.

Until recently, the Committee was involved in no major municipal equalization case, although it had sought what Mr. Himmelman calls "a revenue sharing analogue to Hawkins v. Town of Shaw." *In* Dorothy Lee Cain v. Ouachita Parish, Louisiana, *the LCCRUL has found such a suit. Ouachita Parish receives $600,000 in revenue sharing funds and chooses to spend it for a variety of services, including roads ditches, fire services, recreation, libraries, capital construction – all areas in which local black citizens claim systematic denial of equal service. The five black communities in Ouachita Parish are classically segregated and classically deprived. For example, most paved roads end where the black community starts; the few paved roads that continue are poorly maintained, fire fighting services are not provided equally to black communities, and drainage ditches in these areas are almost nonexistent. Compounding these disparities is the fact that most parish departments also discriminate in employment. As its first step in the Ouachita action, the Committee has petitioned the Treasury Department to launch an investigation leading to administrative hearings to terminate further funding of the parish unless and until it reforms its practices.*

While the prosecution of the Ouachita Parish, Louisiana, equalization case will afford the LCCRUL substantial opportunity to observe the practicality of revenue sharing litigation in the equalization area, the Committee has made some general observations as to the advantages and disadvantages of proceeding under the nondiscrimination standards of the revenue sharing program by filing complaints with the Treasury Department's Office of Revenue Sharing (ORS).

ADVANTAGES OF THE REVENUE SHARING REMEDY

A chief advantage in utilizing the administrative revenue sharing remedy in municipal services discrimination cases is that the threat to terminate massive amounts of federal assistance often provides a powerful incentive to correct illegal practices; it is likely that a governmental jurisdiction which is the subject of an equalization attack under the Revenue Sharing Act, and which may lose hundreds of thousands or even millions of dollars annually, may be more inclined to respond to civil rights pressures than if merely faced with a threatened injunction. (There is no possibility of a fund cut-off if complainants by-pass ORS and sue directly in federal court, although some form of injunctive relief might be available.) Similarly, if federal authorities are persuaded to become active forces supporting enforcement of nondiscrimination standards, local officials are usually more wary and federal courts are frequently more receptive to providing relief.

The regulations which have been promulgated in implementation of the statute make expressly illegal a host of governmental practices at the state and local level which involve the provision of municipal services. These standards facilitate the filing of equalization suits under the Act.

For example, no matter how small the allocation of revenue sharing funds to a particular governmental program or activity, so long as the federal dollars can be traced, discrimination is subject to attack. Because revenue sharing funds tend to be spent in a variety of governmental categories, there is a substantial handle to examine governmental practices across a broad spectrum. (See 31 C.F.R. § 51.32.) Thus, a recipient government may not directly or indirectly "provide any service or other benefit which is different, or is provided in a different form from that provided to others under the program or activity," 31 C.F.R. § 51.32 (b)(1)(ii); "restrict in any way the enjoyment of any advantage or privilege enjoyed by others receiving any service or benefit under the program or activity," 31 C.F.R. § 51.32(b)(1)(iv); or "deny an opportunity to participate in a program or activity as an employee," 31 C.F.R. § 51.32 (b)(1)(vi). The regulations further explicitly provide that a recipient government cannot discriminate "in determining the site or location of facilities," 31 C.F.R. § 51. 32(b) (3). Significantly, the regulations also authorize recipient governments to take action "to ameliorate an imbalance in services or facilities provided to any geographic area or specific group of persons within its jurisdiction, where the purpose of such action is to overcome prior discriminatory practice or usage," 31 C.F.R. § 51.32(4).

Thus, the requirement that services financed by revenue sharing be equalized is made an explicit condition of the receipt of

revenue sharing funds, and recipient governments are obligated to conform to those requirements. This provides a reasonable weapon in monitoring and enforcing civil rights requirements.

Proceeding under the Revenue Sharing Act require allegations of race (or national origin, color or sex) discrimination. Hence, this remedy by definition avoids the problems inherent in the Supreme Court's decisions in a variety of cases potentially affecting equalization litigation, including *San Antonio School District v. Rodriguez*, 36 L. Ed. 2d 16 (1973); *Jefferson v. Hackney*, 406 U.S. 596 (1972); and *James v. Valtierra*, 402 U.S. 137 (1971). This is so because the problem of distinguishing wealth classification or compelling state interest v. rational relationship tests does not arise in the revenue sharing context. Conversely, revenue sharing affords no real opportunity to challenge those Supreme Court rulings. Proceeding under the statute instead of under the constitutional theory would thus tend to simplify the case and make it straight federal assistance litigation.

Another advantage of proceeding under the Revenue Sharing Act is that the 42 U.S.C. § 1983 problem of defining the defendants is largely eliminated. Under § 1983, governmental jurisdictions as parties probably cannot be held responsible for the discrimination which exists within their borders; rather, only individuals can be and they are frequently judgment-proof (See *City of Kenosha v. Bruno*, 93 S. Ct. 2222 (June 11, 1973). Under the statute, however, a governmental jurisdiction is clearly the responsible agency, and included among the remedies available against noncomplying jurisdictions is repayment of revenue sharing funds in the event discrimination is proved and not corrected. (See 31 C.F.R. § 51.32 (f)(3)(v). Therefore, one avoids the concern in private constitutional litigation of which defendants to name and whether all necessary parties have been joined. Similarly, since the Treasury Department as the responsible federal agency under revenue sharing would be in charge of any administrative or court proceedings in the event it concluded that there was discrimination, there is clearly no danger of an attack against plaintiffs or their class as being unrepresentative or in some other way barred from seeking relief.

LIMITATION OF THE REVENUE SHARING REMEDY

There are some obvious disadvantages to litigating administratively for equalization under the Revenue Sharing Act. Foremost among these is the potential for an inordinate time delay before final relief is available if a recipient government fights charges of discrimination to the maximum. Because of the general requirement that administrative remedies be exhausted, reasonable estimates indicate that a minimum of 18 months can elapse before a final remedy is obtained from the Treasury Department, and after that, lapse time in judicial review is still a possibility. The delay is virtually built into the timetable set out in the Revenue Sharing Act and regulations (undoubtedly because of the political framework which dictates that the new federalism move from government-imposed to "cooperative" policies).

For example, after a petition is filed, the Office of Revenue Sharing has to make a preliminary determination of whether or not there is discrimination. This can take three months or more, and after the preliminary determination is made the governor must be notified and be given at least 60 days to seek voluntary compliance. However, thereafter, if Title VI powers are exercised, an additional two weeks must be accorded the recipient in an effort to obtain voluntary compliance, and then a formal complaint process begins which, including time for answer, discovery, hearings, briefs, initial decision, additional briefs, and decision of the secretary, could mean delays of six to nine months or more. After the secretary has made his final decision, another 30 days must elapse during which time he is required to notify the appropriate House and Senate Committees of his findings. Thereafter, judicial review lies in the U.S. Court of Appeals. (Fortunately, during all these proceedings the Treasury Department has legal authority to defer any further revenue sharing payments.)

In most cases, there is no way of avoiding the complex and protracted administrative remedies established by the revenue sharing legislation. Only when (as in Chicago) federal officials refuse to act at all can the administrative process be circumvented and a direct appeal be taken to the District Court. Obviously, however, once the latter event occurs, some of the advantages of proceeding under the Revenue Sharing Act are lost. Federal officials are no longer leading the fight for enforcement and acting as plaintiffs against recalcitrant recipients; but rather, Treasury officials themselves are the defendants. Long delays are incurred while obtaining a court order to initiate compliance procedures at the administrative level. Infrequently, if ever, would plaintiffs suing Treasury officials ask the court immediately to adjudicate the charges of discrimination against the recipient government; rather, the relief requested is almost always that the federal officials simply be compelled to act.

A distinct tactical disadvantage in proceeding through the administrative network is that, once Treasury compliance officers determine to act, the statute and regulations assume that they assume the burden of litigation. Complainants are accorded no explicit standing even to be parties to the administrative hearings. In ideal times, federal officials arguably can be entrusted with this responsibility; currently, it is not certain they can be.

Another major problem with using the revenue sharing program to require equalization is obviously that enforcement can be attempted against a recipient government only if there is a nexus between the use of revenue sharing and the particular charge of discrimination in the delivery of municipal services. Thus, if there are unequal services involving roads, sewage disposal, and construction of drainage ditches but the recipient government allocates all of its revenue sharing funds to recreation, public safety or the construction of a new courthouse, under existing authority it would probably be impossible to bring an equalization suit. The only possible handle would be proof that the revenue sharing funds which went to the nonrelated categories specifically displaced general funds already allocated to those categories so they could be used in the discriminatory activities. Needless to say, this is a complicated matter just from the auditing perspective.

Another disadvantage is that proceeding under the Revenue Sharing Act eliminates the kind of pendent jurisdiction that federal courts have, in constitutional cases, to look at related state or other claims. And finally, a charge of discrimination brought under the Revenue Sharing Act must be far more detailed and well-documented at the outset than a constitutional case because of the general lack of expertise in civil rights enforcement which prevails today in most governmental agencies and noticeably in the Treasury Department.

PROSPECT

There are common problems in equalization litigation whether proceeding under the constitutional or the statutory theory. For example, if special assessments are used by a jurisdiction for its general municipal improvements, the problem of proving race as compared to wealth discrimination becomes overriding in either instance. Several prospective cases in the revenue sharing equalization area were ultimately rejected by LCCRUL for tactical reasons, when it was learned that improvements were made by special assessments routinely granted to those blacks who could afford to apply and that the basic problem was that most blacks lacked the means. Although there is little doubt that the use of special assessments is an invidious and inherently discriminatory device, under recent Supreme Court rulings plaintiffs' burden of proof in such cases is extraordinarily high. Serious consideration must be given to a strategy which will prevail in this area.

Under either *Hawkins v. Town of Shaw* or revenue sharing litigation, both of which require racial impact if not motive, it is likely that southern rather than northern jurisdictions will remain the focus of equalization litigation. Although some of the more glaring problems may still exist in the south, no one can seriously doubt that blacks in larger northern urban centers suffer comparable discrimination. Yet we have not found and are aware of no one who has found northern targets for the traditional equalization remedy.

Probably the best course to pursue is a combination of constitutional and statutory litigation. Even if revenue sharing procedures are a slower remedy than constitutional litigation, the potential impact of a successful revenue sharing suit in this area could be dramatic. For once the 38,000 recipients of revenue sharing payments become aware that the federal government is serious about terminating (or demanding repayment of) revenue sharing funds where there is a finding of racially discriminatory delivery of municipal services, those recipients will have a powerful incentive to insure that their revenue sharing money is used to correct the effects of discrimination. If, on the other hand, we either cannot make the federal government responsive or we determine that the statutory remedy is unacceptably time-consuming, we may have no choice but to continue to make the seemingly difficult search for more *Shaws*.

UCLA INSTITUTE OF GOVERNMENT AND PUBLIC AFFAIRS

A vital factor in the distribution of public services is annexation, detachment, incorporation and other boundary changes that result in the provision or denial of service. A project to study racially discriminatory incorporation and boundary change practices is under way at the UCLA Institute of Government and Public Affairs, and a report on its work was presented to the conference by Jacqueline Leavitt.

Communities can expand, contract or create boundary lines through annexation, detachment, incorporation and consolidation. The procedures for effecting such changes are defined by state law which is generally silent on equity issues. Frequently, boundary changes are made for discriminatory reasons, to exclude undesirable areas or areas of high service costs. The excluded areas are denied public services. The purpose of the UCLA project is to inventory and to describe the misuse of incorporation and boundary change practices, to study illustrative cases in depth, to evaluate consequences, to develop legal theories that can be used to challenge these practices, and to draft model legislation and administrative procedures to prohibit them.

Denial of municipal services itself was allegedly the reason why the City of Marks, Mississippi, initiated detachment proceedings to rid itself of a recently annexed and predominantly black neighborhood. In 1961, the new area had been brought into the city, and the court approving the annexation ordered that police and fire protection, fire hydrants, street draining and paving be provided. Rather than deliver these services, the city moved to deannex the area, although black residents challenged the detachment in *Franklin v. City of Marks*, 439 F. 2d 655 (5th Cir. 1971).

In a reverse municipal service situation, an unincorporated community of Mexican Americans near Blythe, California, for years sought annexation to that city in order to obtain services the county was unable to provide. Although the city government was able to delay the union, annexation was finally accomplished after litigation was threatened.

But denial of municipal services is not the only effect or the only motive for discriminatory boundary changes. Political power is sometimes at stake. In *Holt v. City of Richmond*, 459 F. 2d 1093 (4th Cir. 1972), black residents of the Virginia capital claimed that annexation of some 16 square miles of Chesterfield County reduced the black population of Richmond from a majority of 51.5% to a minority of 42%. Although the federal district court found the annexation racially motivated, four of the six circuit court judges agreed, on appeal, that there were other legitimate reasons for the action.

In Missouri, the community of Black Jack was allegedly incorporated specifically to provide the residents of that area with power to zone out low income housing and preclude the construction of a federally subsidized 236 project. However, the federal district court ruled, on March 20, 1974, in *United States of America v. Black Jack, Missouri* D.C.E.D. Mo. 71C372, that the government had failed to prove that prevention of the 236 project was racially discriminatory in motivation or effect. The court rejected demographic arguments and would not rule on "regional, flexible planning."

But a 1972 decision of the Fifth Circuit reversed, in part, a district court ruling denying the request by developers of a low income housing project for an extension of municipal services. In *United Farmworkers of Florida Housing Project, Inc., et. al. v. City of Delray Beach, Florida*, No. 72-3804 (5th Cir. 1973), city officials stipulated that extension of services depended upon prior annexation, although several unannexed developments, predominantly white, were being served at the time. Taking into consideration inconsistencies in planning procedures, the earlier denial of an application for low income housing by the city, the desperate housing need of farm workers, and the concentration of almost all low income housing in a segregated area, the court ruled that "the City failed to meet its burden of proving that refusal was necessary to promote a compelling governmental interest, and thus city officials have deprived the farm workers of equal protection of the law under the Fourteenth Amendment."

Instances of racially discriminatory boundary changes are far from rare, but they had been unevenly documented prior to the UCLA study. By searching the literature and reviewing more than 200 questionnaire responses, the research project has identified 104 locales where a boundary change is alleged to have been discriminatory. Although the questionnaires are still being re-

viewed and analyzed, preliminary findings suggest that discrimination is most often and obviously racial and that there are no distinct regional patterns (although the number of cases in the northeast is low).

As part of the project, law professors are supervising students studying an incident in Pearl, Mississippi, and several incidents in St. Louis County, Missouri. In Pearl, the issue is defensive incorporation. Facing annexation by the City of Jackson (more than 50% black), the residents of Pearl chose borders that created a community 97% white and then formed their own school district.

In St. Louis County, a variety of boundary change practices have produced discrimination in housing, education and public services. Within the county is the City of Webster Groves that has consistently refused to annex a contiguous black area because it does not want to provide services. The City of Kirkwood, also within the county, chose to annex the only commercially valuable property in an adjoining, unincorporated pocket of black poverty.

The UCLA project has conducted case studies in Gary, Indiana; Decoto and Alviso, California; Chapel Hill, North Carolina; and recently in Belle Glade, Florida. Belle Glade is 53.3% black but has been increasing its white population since 1960, mostly through annexation. Yet the city refuses to annex Okeechobee Housing Center which is predominantly black. A Farmers' Home Administration project, the Okeechobee Center lies outside the city's corporate limits but within the Greater Belle Glade Planning Area. Under Florida law, this area is reserved for Belle Glade and cannot be annexed by another municipality.

A number of Center residents have repeatedly petitioned for annexation of the project. In 1973, they were told the city commission "would consider annexation if the request were made by the Belle Glade Housing Authority, the property owner." Since the Housing Authority refuses to act, some community workers believe the next step is litigation. However, there is a sense of frustration among the Okeechobee residents, and a few admit they are fearful of signing a petition or suing for annexation.

The need for new state standards and procedures to counter discriminatory boundary changes is obvious. Equally important is the need to develop mechanisms for identifying and analyzing the impact of a boundary change and devising legal strategies to combat practices that produce discrimination of various kinds, not the least of which is the denial of public services.

AMERICAN CIVIL LIBERTIES UNION, SOUTH TEXAS PROJECT

David Hall, of the ACLU Foundation's South Texas Project, is working to secure public services for about half a million people, mostly Mexican-American residents of small, unincorporated communities in the Lower Rio Grande Valley called colonias. *Although there are in the area 35 incorporated towns (one surrounding a* colonia*), 16 water districts, two regional authorities and four county governments, half the* colonias *have no running water at all, and few have sewer systems, drainage systems or any fire protection.*

Residents of dry colonias *get water in 55-gallon drums from friends or relatives in town. They take it from irrigation canals (laced with fecal organisms) or, if they can afford it, they drill shallow wells that are often contaminated and certain to be briny. Texas Health Department statistics show the results. In this part of the state, the incidence of amoebic dysentery is almost ten times the national average, typhus is more than 150 times the national average and polio strikes at least 20 times as often as it does in the rest of the nation.*

Hall's report to the Conference focused on legal initiatives of the South Texas Project.

Many thousands of Mexican-American farm laborers living in the southern tip of Texas are wholly deprived of a safe water supply, sanitary sewer systems, drainage, solid waste disposal systems, paved streets, and similar municipal services. Services are denied these people *because they live in rural, unincorporated subdivisions* known in Spanish as *colonias. Colonias* have mushroomed in the Lower Rio Grande Valley during the last 15 years, created by the matching of land developers' greed with the farm workers' need for cheap shelter during the winter months when they are not migrating. More than 85 such subdivisions have been formed in Cameron and Hidalgo Counties within the last two decades.

Efforts to alleviate the municipal services plight of the *colonias* have been sporadic and largely unsuccessful. (See Fred Powledge's "Getting a Handle on the Drinking Water Problem," *New South,* Vol. 28, No. 4, Fall, 1973.) Numerous agencies and governmental units have authority to deal with the municipal services problems of the *colonias;* none have volunteered to exercise that authority. A variety of water districts, regional water and pollution authorities, incorporated cities, and private membership water supply corporations could provide all or part of the services needed but have largely failed or refused to act.

According to those who are closest to the water and sewer problems in the *colonias,* the most appropriate political entities to serve the communities are the water control and improvement districts (WCIDs) that blanket the valley. Like the Central Valley in California, the rich agricultural economy in this semi-arid region relies upon irrigation. The irrigation system is administered by some 16 WCIDs that lift the water from the Rio Grande and allocate it to the agricultural interests holding "water rights."

The WCIDs have broad powers to deal with virtually any aspect of the state's water resources: municipal and domestic water supply, sanitary sewer systems, industrial water supply, irrigation, production of hydroelectric power, navigation, conservation, forestry, drainage and recreation. Each water district is governed by a five-man board of directors elected by the residents. The board has the exclusive power to determine what activities will be engaged in by the district.

Unlike the situation in other parts of Texas, the valley's water districts have applied their resources exclusively to irrigation projects. The WCID has been the private tool of Anglo farmers, but the Anglos' dominant position has become precarious in recent years. In most of the districts, the Chicano farm workers living in *colonias* now outnumber the Anglo growers by ratios of nearly four to one. In the past, most water district elections were uncontested affairs in which only 20 or 30 votes might be cast. In short, the districts looked ripe for a Chicano takeover.

However, the districts are not controlled by political neophytes. In 1971, seeing the proverbial handwriting on the wall, the valley WCIDs authored a statute that slipped through the Texas Legislature without opposition. The statute, Vernon's Ann. Tex. Stat., Art. 8280-3.2, permits WCID boards to exclude "urban property" *(i.e., colonias)* from the districts by merely holding a hearing for that purpose. The only requirement is constructive notice by posting and publication to inform *colonia*

residents of the exclusion hearing. At the hearing, the board determines whether the property meets the definition of "urban" and whether it would be in the best interests of the district and of the property in question to exclude it. Needless to say, the farmer-directors do not have to struggle to reach a decision to exclude the *colonias*, whose residents present potential political difficulties and a possible drain on public resources.

The exclusion hearings were such a well-kept secret that it was not until a year after the first round of exclusions that the *colonias'* representatives discovered what had happened. When requests were made of the districts to consider the *colonias'* municipal services problems, the WCIDs pointed to the exclusion resolutions. Suit was filed to challenge the constitutionality of the exclusion process and its enabling statute.

Jimenez v. Hidalgo County Water Improvement District No. 2, No. 73-3557 (5th Cir. 1974), was filed on December 16, 1972, by the American Civil Liberties Union Foundation-South Texas Project, in an effort to have the *colonias* returned to the WCIDs before the January, 1973 elections for board directors. The suit challenges the failure to provide adequate notice of the exclusion hearing on due process grounds. The *colonias* residents seek to have the federal courts determine whether the notice afforded them was reasonably calculated to apprise them of a proceeding in which their legally protected interests were in jeopardy. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Schroeder v. City of New York*, 371 U.S. 208 (1962). The district court dismissed the challenge to the constitutionality of the exclusion statute without convening a three-judge court, contending that the constitutional claim was "insubstantial." *Jimenez* was appealed to the Fifth Circuit, together with a companion case seeking to have two Chicano candidates' names placed on the ballot for district director. *Fonseca v. Hidalgo County W.I.D. No. 2*, No. 73-3556 (5th Cir. 1974).

The *Jimenez* case presents several difficult questions regarding the application of the due process clause to the exclusion proceedings. First of all, there is some question of whether the plaintiffs' claims present a justiciable question. *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907), is frequently cited to argue that states are absolutely free, unfettered by the confines of the Fourteenth Amendment, to deal with political subdivisons as they will. The sweeping language of the *Hunter* opinion, which supports such a view, was restricted to some extent by the court in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). But there are a vast number of decisions in both federal and state courts rejecting equal protection attacks on annexation procedures; *e.g., Adams v. City of Colorado Springs*, 308 F. Supp. 1397 (D. Colo. 1970), aff'd. 339 U.S. 901 (1970). The *colonias* residents are arguing that there is a fundamental difference between exclusion, with its loss of voting rights, and annexation, with its creation of voting rights. A second question is whether the exclusion hearing is sufficiently adjudicatory in nature to invoke due process protections. The plaintiffs are arguing that the board was sitting in a quasi-judicial capacity when deciding whether or not to exclude each *colonia* and its residents from the territory of the water district.

The third question presented is whether the *colonias* were deprived of a legally protected interest when they were excluded. The interest advanced by the residents is primarily the right to vote in order to obtain a safe water supply and other municipal services. Plaintiffs are arguing that they were "fenced out" of the electorate because of fears that domestic users would seize control of the district from agricultural users. *Cf. Carrington v. Rash*, 380 U.S. 89 (1964).

Finally, the court must determine whether the constructive notice provided complies with due process standards. Under *Mullane* and *Schroeder*, the notice clearly does not.

Oral arguments were conducted before the Court of Appeals in New Orleans on April 22, 1974. The central issue before the court was the necessity of a three-judge court, as measured by the standard of *Goosby v. Osser*, 409 U.S. 512 (1973). Appellants argued that their claims regarding the constitutionality of the statute are not "wholly without merit," "obviously frivolous," or foreclosed by prior decisions of the Supreme Court, and therefore the case should have been heard by a district court of three judges. On June 17, 1974, the Fifth Circuit ruled for the plaintiffs, and remanded both *Jimenez* and *Fonseca* to the district court for three-judge treatment. *Jimenez v. Hidalgo County W.I.D. No. 2*, 496 F. 2d 113 (5th Cir. 1974); *Fonseca v. Hidalgo County W.I.D. No. 2*, 496 F. 2d 109 (5th Cir. 1974).

Litigation against special purpose units of local government has been complicated of late by the Supreme Court's decisions in *Salyer Land Co. v. Tulare Water Dist.*, 35 L.Ed. 2d 659 (1973) and *Associated Enterprises, Inc. v. Toltec Watershed Improvement Dist.*, 35 L.Ed. 2d 675 (1973). The *Salyer* and *Toltec* companion decisions have apparently drawn the outer limits of the Warren Court's series of decisions extending strict scrutiny of voting rights standards to local units of government, such as junior college districts, municipalities, and county commissioners' courts. The Supreme Court refused to apply the strict scrutiny standard to irrigation districts in California and Wyoming, holding that if a special purpose unit of government has a disproportionate effect upon a discernible class (*e.g.*, landowners in an irrigation district), and the district does not exercise "normal governmental powers," then denial of voting rights to those not falling within the preferred class need only be justified by a showing that the classification is rationally related to the achievement of any legitimate state objective. The *colonias* residents in *Jimenez* and *Fonseca* contend that Texas WCIDs exercise such broad powers that no one group, such as landowners or farmers, is disproportionately affected.

Success in this lengthy litigation will allow political access to the governmental unit that, in many respects, is the foundation of the valley's agricultural economy. Political access will not be quietly surrendered. But the stakes are even higher for a family whose children are drinking polluted water from an irrigation canal.

INFORMAL PRESENTATIONS

SOUTHERN REGIONAL COUNCIL (SRC)

The SRC's Southern Governmental Monitoring Project, according to its director, Joe Tom Easley, is not involved in litigation but does hope to provide the factual basis for equalization suits. Its investigations are aimed at discovering the impact of federal categorical grant programs and revenue sharing grants at the local level, particularly as they relate to services for minorities and the poor.

While the project's permanent staff is engaged in studies of 11 southern state governments, a task force of 40 interns (all law students) surveyed conditions in smaller political subdivisions – cities, counties, townships – during the summer of 1974. The

major assignment of the task force was to accumulate data to be used in 1976, when Congress reconsiders the revenue sharing legislation. However, Mr. Easley assured the Conference, "One thing they will be doing is working with community organizations to see what the possibilities are for equalization suits – straight *Shaw* suits, revenue sharing equalization suits and revenue sharing equal rights suits."

The interns' efforts – conducting interviews and digging out the facts at the local level – represent the first step in the project's effort to examine the impact of governmental decentralization in the target states, with special emphasis on the effect of the New Federalism on low and moderate income citizens. Most of the interns were law or graduate students and most were southerners or students at schools in the region.

For ten weeks they examined general revenue sharing, manpower, special revenue sharing, the new Supplemental Security Income (SSI) program, mass transit, the food stamp program, housing (especially mobile homes and the impact of the housing subsidy moratorium), and health programs. They also documented denial of access to the agencies they studied and to the information they needed. Finally, they profiled citizen group activity or inactivity in each of the 40 locations, so the project will be better able to identify groups that can use its technical assistance in participating in local government.

GREATER BIRMINGHAM MINISTRIES (GBM)

With a grant from Trinity Parish, Greater Birmingham (Alabama) Ministries initiated a program in law reform. Ina Leonard, who heads the project, reported to the Conference on efforts to encourage or compel the Birmingham Water Works Board to supply water to families within the city and surrounding Jefferson County who now lack such service. GBM had estimated that as many as 5% of the residents in the area served by the Water Works Board (some 30,000 persons) were in need of a dependable supply of potable water. Some had no water at all, others tapped their neighbors' lines or had their own wells (half of which sample testing has indicated is unsatisfactory).

The Water Works Board is a quasi-public body, whose members are appointed by the city government. It ostensibly functions as a public utility within the city and as a private, profit-making venture outside it. However, while extending service to new suburban developments, it refused to provide water to several parts of the city where residents are black and poor and often unable to pay the assessments for initiating service. Litigation was contemplated to establish, through the courts, the Board's obligation to serve *all* homes within the city.

This proved to be unnecessary, once the GBM project began generating pressure and publicity. Although Birmingham's City Council had previously insisted it could not direct the Water Works Board to extend service, the Council now supports GBM's demands. A plan was eventually negotiated under which the Board agreed to lay mains at no cost to the residents as long as a majority of homeowners on a serviced street paid a tapping fee or was prepared to tie into the main. This represented a considerable concession on the part of the Board.

However, the Board remains committed to maximizing profits in its actions outside the city, although there is a real need for potable water in many poorer and unincorporated parts of Jefferson County. The county is willing to apply some of its revenue sharing funds to offset the costs of extending service to these areas. In an attempt to influence the Board, GBM has joined with other groups contemplating a suit challenging the Board's right to serve areas beyond Jefferson County by alleging endangerment of the local water supply. The goal of this litigation is to extract a commitment from the Board to first provide service throughout Jefferson County. As a result of this pressure, the Birmingham City Council is currently considering its own legal action against its agent, the Water Works Board.

ALLISON W. BROWN, JR.

An attorney in Alexandria, Virginia, who has handled several significant civil rights cases, Mr. Brown brought an equalization suit (*Fairfax County Wide Citizens Association* v. *County of Fairfax, Virginia*, C.A. 336-71-A, E.D. Va.) against Fairfax County, the Virginia State Highway Commission, and the Town of Herndon. This is the only such suit brought to date in a court in the Fourth Circuit.

Fairfax County has a population of 455,000 of whom about 3.5% are black. Most white residents live in new subdivisions built since World War II, while most blacks live in small neighborhood enclaves, which were once rural but which are now surrounded by the new subdivisions. Though all community facilities were surveyed, the principal disparity between black and white neighborhoods was the lack of paved streets in the former. Using U.S. census breakdowns, the plaintiffs demonstrated that 61% of the county's black residents lived on unpaved streets and that only about 0.6% of the white residents were similarly situated. Exhibits were prepared based on field surveys and relying extensively on photographs to demonstrate the substandard characteristics of streets in black neighborhoods.

The State Highway Commission was joined as a defendant, because under state statute all roads located in the county are part of either the state primary or secondary road system and are controlled and maintained by the state. However, most roads in the black neighborhoods have never been taken into the state system because they did not meet minimum standards. One of the objects of the lawsuit was to compel either the state or county to take responsibility for the upgrading and continued maintenance of such roads.

District Judge Albert V. Bryan, Jr., in an unpublished opinion dated December 2, 1971, denied defendants' motions to dismiss, relying on *Hawkins v. Town of Shaw*. Just before trial, however, the case was settled when the defendants agreed to spend some $1.5 million to upgrade and pave 89 streets and make certain other improvements in black neighborhoods. In assessing his effort in this case, Mr. Brown believes that it, as well as some others that have been brought since the *Shaw* decision, illustrate how responsible public officials are likely to agree to settle out of court, once the facts have been marshalled and a lawsuit is threatened or filed, thus obtaining the remedy sought by the plaintiffs without the expense of a full trial.

But he notes that even after such a case is settled, the attorney has a continuing responsibility to see that full compliance is effectuated. For example, the defendants in the Fairfax County case have three years in which to do all the work necessary to comply with the settlement agreement. The postsettlement stage of the proceeding, when the improvements are being carried out, may be as time-consuming for the attorney as the presettlement

stage. The task entails monitoring the work that is done to see that it meets acceptable standards, acting as intermediary between leaders in the black neighborhoods and public works' officials, and enlisting the aid of engineers and other experts as the need arises to help work out problems. In a remote locale this follow-up would entail travelling and considerable expense. On the other hand, it might be possible to utilize the services of a local lawyer or other expert at that stage.

ROBERT LEIRER JUSTICE

An Indiana attorney, acting for the Indiana Civil Liberties Union, Mr. Justice has brought suit against the town of Clarksville and two privately owned utility companies in what he calls "a *Shaw* type case with a kicker." To secure gas and water service for an unserved black subdivision of the town, Justice is seeking to establish a duty on the part of the private utilities to extend service for reasonable deposit fees and a duty on the part of the town to compel the utilities to so extend their services. Plaintiffs also ask an extension of city sewers by the town.

Justice's case, *Vaxter v. Town of Clarksville, Ind.; et al.* (S.E. Ind., New Albany Division-NA 73-6-26) raises a number of novel issues that could be significant wherever public services are provided in a similar fashion. Plaintiffs allege that, as part of its general welfare obligations, the town has a duty to provide its citizens with the opportunity to obtain municipal services. Because the town has allowed the utilities to perform these services on its behalf (and because of extensive state regulation and control of the utilities), the privately owned companies are subject to the same constitutional standards as the governmental entity would be. According to the plaintiffs, the companies and the town have totally deprived the black subdivision of services which the other white areas of the town receive, and this constitutes a denial of both equal protection and due process. The due process argument is based on a representation that gas service and water service are entitlements running to the plaintiffs.

Although several of the legal theories advanced in *Vaxter v. Town of Clarksville* are novel and may not prevail, the detailed documentation of the service denial and the publicity this has generated make settlement of the case likely.

The Educational Parallel

The question of limited, local resources often distributed in an inequitable fashion is basic both to the equalization of public services and to school finance reform. As a result, lessons drawn from the more extensive school finance litigation have great significance for those involved in equalization suits.

Since most schools are financed primarily by local property taxes and funding is limited by the property wealth of individual districts, the quality of education depends, in large measure, upon the district in which it is dispensed. The first suits to challenge this situation were based on the equal protection guarantee of the Fourteenth Amendment and maintained that educational financing should be determined by educational needs. Although these suits failed, they led to a judicially more compelling argument, the notion of "fiscal neutrality," rather than asserting any particular system for distributing educational funds. The "fiscal neutrality" theory simply held that public school finances could not depend upon the wealth of the local school district. "The quality of public education may not be a function of wealth, other than the wealth of the state as a whole," said the authors of "fiscal neutrality" (Profs. John E. Coons, William H. Clune III, and Stephen D. Sugarman).

But for the concept of fiscal neutrality to prevail, a case first had to be made for education as a fundamental interest worthy of inclusion under the equal protection guarantee. Such a case was argued in Serrano v. Priest, *filed in California state court in 1968. Three years later, in denying a motion to dismiss, the California Supreme Court agreed that education was a fundamental interest and that, if the facts in* Serrano *were as alleged, the right to education had been infringed. The court declared that the state's methods of financing education "invariably discriminates against the poor because it makes the quality of a child's education the function of the wealth of his parents and neighbors." Remanded to the trial court,* Serrano *was decided early in 1974 when the state's school finance system was found to violate California's Constitution. In the wake of* Serrano, *more than 30 similar suits were filed in state and federal courts.*

The door Serrano *had opened was slammed shut by* Rodriguez. *In* Rodriguez v. San Antonio Independent School District, *arguments with the same theoretical basis as* Serrano *convinced the federal district court to declare the Texas school finance system unconstitutional. But, in 1973, the U.S. Supreme Court reversed the* Rodriguez *decision, declaring that education is not a fundamental interest under the U.S. Constitution and that "social importance is not the critical determinant for subjecting state legislation to strict scrutiny." In addition, the court held that Texas had not singled out poor families for discriminatory treatment.*

Once the court had eliminated education as a fundamental right and determined that an unlawful classification based upon poverty did not exist, it needed only to decide if there was a rational basis for any educational discrepancies.

Admittedly reluctant to "apply too rigorous a standard of scrutiny lest all local fiscal schemes become the subject of criticism under the Equal Protection Clause," the court found that Texas was providing adequate education for children in all its schools and that any discrepancies were justifiable. The court held that "where wealth is involved the Equal Protection Clause does not require absolute equality or precisely equal advantages."

Although there may well be grounds for a challenge to state educational finance plans under the equal protection guarantee of the federal Constitution, Rodriguez *would seem to have effectively blocked that route for the present. If school finance challenges are to be mounted now, a more appropriate basis would seem to be state constitutional or statutory provisions.*

Robinson v. Cahill *successfully employed such means to require a more rational method of school financing in New Jersey. An attorney associated with the* Robinson *case, Paul Tractenberg of Newark's Education Law Center, Inc. addressed the Conference during its first day on "The Lessons of School Finance Equalization."*

During the past several years, school finance equalization has often been correctly perceived as a step toward broader public service equalization. Yet, paradoxically, school finance reform *per se* has received far more attention than the broader equalization questions it should trigger. *Serrano v. Priest*, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971), has received more extensive treatment in the legal and public policy literature than *Hawkins v. Town of Shaw*, 461 F.2d 1171 (5th Cir. 1972); only rarely have the two been perceived as closely related cases. See, *e.g.*, Note, "Equalization of Municipal Services: The Economics of Serrano and Shaw," 82 Yale L.J. 89 (1972).

The nexus is there, however, in law and in public policy. An effort to rationalize and extend the public service equalization movement must learn well the lessons of the school finance equalization movement.

Lesson I. The first lession is axiomatic: pick your cases well; know the facts thoroughly before you begin to proceed; be sure the facts support in the strongest possible way your legal theories; proceed in an incremental fashion so that the courts are presented initially with manageable fact situations and legal issues rather than with the most global and revolutionary of cases.

The case of *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), perhaps the most notable failure of the school finance equalization movement, is the text from which this lesson of case selection is drawn. There, without sufficient preparation and forethought, the federal equal protection challenge to a school finance law came before the United States Supreme Court.

The Texas statute in question and the state allocation of fiscal responsibility under it were hardly among the worst in the country. The statute specified the indicia of a basic educational program which had to be provided from state funding, and the state's share of total educational costs was more than 50%. By comparison, in New Jersey there had been no such specification, and the state's share has ranged between 25 and 28%. The Supreme Court would presumably have found it more difficult to dispose of a situation like New Jersey's, at least on the theories it articulated.

Even beyond that, however, critics of *Rodriguez* have argued that a case like *Lau v. Nichols*, 94 S. Ct. 786 (1974), rather than *Rodriguez*, should have been presented first to the Supreme Court. In *Lau* the plaintiffs challenged the failure of the San Francisco School District to provide a meaningful educational program for most Chinese students who had limited English language facility. The Supreme Court held for the plaintiffs, but on the basis of Title VI of the Civil Rights Act and not the equal protection clause, perhaps because *Rodriguez* had already caused the Court to rule that education was not a "fundamental right."

Lesson II. A second lesson is to be wary of requesting very detailed relief from the courts. Especially in areas involving expenditure of public funds and interrelationships among branches

of government, the courts are uncomfortable intruding themselves into programmatic details. The specter of the court as superadministrative agency or superlegislature haunts judges. This is not to suggest courts will ultimately refuse to involve themselves in detailed intervention if that seems the only means of vindicating constitutional or even statutory rights (as they have done ultimately in areas such as school desegregation and legislative reapportionment); it is to suggest that such intervention usually takes place only after there is substantial evidence of unwillingness or inability of governmental defendants to implement a legally sufficient program.

The school finance cases support this lesson, too. In the late 1960's, two challenges to typical school finance statutes failed because they were not "judicially manageable." *McInnis v. Shapiro*, 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd. mem. sub nom. McInnis v. Ogilvie*, 394 U.S. 322 (1969); *Burruss v. Wilkerson*, 310 F. Supp. 572 (W.D. Va. 1969), *aff'd. mem.*, 397 U.S. 44 (1970). That meant the "educational needs" standard argued for by the plaintiffs would have required the courts, in assessing the statutes and in ordering remedies, to make judgments about the appropriateness of educational programs and about the nexus between cost and program quality.

The school finance movement of the 1970's was predicated on a theory – "fiscal neutrality" – which asked the courts to rule only that school finance statutes could not be tied to local wealth. The equal protection cases from *Serrano* forward have sought that as the primary remedy. In cases which ultimately were decided on other theories, such as *Robinson v. Cahill's* "thorough and efficient" education requirement and *Lau's* Title VI "nondiscrimination," plaintiffs similarly did not seek elaborate remedies. Instead, they tended merely to ask the court to declare defendants' legislative or administrative actions unlawful and to require defendants henceforth to act in conformity with constitutional or statutory provisions. In cases such as *Robinson* and *Lau* this tactic has left the defendants with substantial discretion in designing their response, a fact which has led to some criticism of the approach. But it has also contributed to favorable judicial precedents which can be built upon.

Lesson III. Judicial activity should not preclude ongoing activity in other spheres, such as legislative reform and public education. *Rodriguez*, for all its depressing effects on the school finance equalization movement, did not end the movement. In fact, legislative activity has been accelerating. This may be explained by the fact that reformers have been able to convince the public and many legislators that existing inequities are unfair and inconsistent with the basic tenets of public education.

Lesson IV. Resort to the federal courts should be carefully considered. Increasingly, the willingness of those courts to strike down state or local government action in the area of social welfare is being brought into sharp question. In *Rodriguez* the Supreme Court showed why. Acknowledging the inequities under Texas' school finance statute, the Court nevertheless preferred to leave the matter to state corrective action. Questions of federalism loomed large in the Court's analysis: states should be left free to devise their own solutions and the federal judiciary should not impose a national solution.

Yet the federal courts should not be ruled out entirely. *Lau* suggests that a case based on a federal statutory theory may still be successful. Moreover, a case involving racial discrimination in the provision of public services will almost certainly prevail. Finally, plaintiffs who can prove an absolute deprivation will find a receptive judiciary. (In *Rodriguez* the Supreme Court noted that if plaintiffs had received *no* education, as opposed to one which cost less, they might have prevailed.)

Lesson V. More attention should be given to state courts but it should not automatically be assumed that they will be more receptive than the federal courts. At one point state courts in California, New Jersey, Michigan, Arizona, Kansas and Idaho had struck down school finance statutes on federal grounds, state grounds or a combination of the two. Cases were pending in a number of other state courts. A trend could then be said to be building. However, more recently the Supreme Court of Arizona reversed the lower court in *Hollins v. Shoftstall*, 515 P.2d 590 (Ariz. 1973), the Supreme Court of Michigan vacated its own decision in *Milliken v. Green*, 212 N.W.2d 711 (Mich. 1973), and a Kansas state court ruled that a new statute eliminated the constitutional problems in *Caldwell v. Kansas*, No. 50616 (Dist. Ct. Kan. July 5, 1973). *Serrano* in California and *Thompson v. Engelking*, Civil No. 47055 (Dist. Ct., Ada Co., Idaho, Nov. 16, 1973), in Idaho are likely to be appealed to higher state courts. Thus, only *Robinson v. Cahill* in New Jersey represents a definitive ruling by a state's highest court that a school finance statute is unconstitutional. The New Jersey courts (as well as the California courts) have for some time had the reputation of being able, independent, and willing to take new judicial directions. It may not, therefore, be safe to generalize too greatly based on *Robinson*. Nonetheless, the posture of the United States Supreme Court may put considerable pressure on state judiciaries to become more active in providing state solutions for state problems, especially in the social welfare domain.

Lesson VI. State constitutional and statutory theories for attacking disparities in public services should be systematically and carefully explored. School finance equalization litigation has usually been based in part or in whole on a variety of state constitutional provisions – equal protection, tax uniformity, education. Others, such as substantive due process, general health and welfare, and the prohibition against private, special or local legislation also might have been utilized. The judicial approach has differed from state to state. In most, equal protection has figured prominently in the decision. But in New Jersey, the Supreme Court rejected the lower court's equal protection approach and decided the *Robinson* case solely on the basis of the education clause.

The New Jersey Supreme Court refused to decide *Robinson* on the state equal protection clause because to do so, in its judgment, would implicate the whole system of delegating fiscal authority to local units of government. The Court saw no way to effectively limit a holding to education. All other important public services – police, fire, sanitation, welfare, housing – would eventually be brought within the same judicial ambit. (Other courts, state and federal, have found it possible to distinguish education from other public services because (1) most state constitutions explicitly guarantee education, (2) education is basic to the exercise of other constitutional rights, and (3) education has long been judicially recognized as the most important public service.)

It is important to note, however, that even given the enormous implications it foresaw if equal protection were applied to public services, the court was not prepared to eliminate that possibility in a proper case. The court even suggested that, "apart from the

equal protection guarantee, there [may be] an implicit premise in the concept of local government that the State may not distribute its fiscal responsibility through that vehicle if substantial inequality will result." *Robinson v. Cahill*, 62 N.J. 473, 500 (1973). And the court stated that such inequality may exist:

> It may well be that at one time there was a rough correlation between the needs of an area and the local resources to meet them so that there was no conspicuous unfairness in assigning State obligations to the local units of government. Surely that is not true today in our State. Problems are now mobile. They have settled intensively in limited areas. Statewide there is no correlation between the local tax base and the number of pupils to be educated, or the number of the poor to be housed and clothed and fed, or the incidence of crime and juvenile delinquency, or the cost of police or fire protection, or the demands of the judicial process. Problems which are in no sense local in origin have become the special burden of those who cannot find a haven elsewhere.
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> — 62 N.J. at 500-01, 303 A.2d at 287.

The court seemed almost to be referring to a pending state court case, *Bonnett v. New Jersey*, Civil No. L3865-72 (N.J. Super., Law Div., filed Oct. 11, 1972), in its remarks. In *Bonnett*, the plaintiffs argued that the State was violating state and federal equal protection clauses by imposing a major part of the costs of "state mandated services" (welfare, the courts, and other agencies which are involved in the administration of justice) upon taxpayers of the county in which those services happened to be provided even though: (1) the provision of the services was mandated by the State; (2) virtually all the decisional power regarding the services was vested in a state or federal agency.

Thus far the New Jersey state courts, despite *Rodriguez* and despite the refusal of the New Jersey Supreme Court to decide *Robinson* on equal protection grounds, have refused to dismiss the complaint in *Bonnett*. They have ruled that a substantial question exists regarding whether there is a "reasonable or rational justification for the New Jersey system of providing welfare assistance and the judiciary, as required by the equal protection clause." The court noted that plaintiffs had the burden of establishing that the system of funding state-mandated services is "unjust and results in illegal discrimination." *Bonnett v. New Jersey*, Civil No. A-2212-72, at 6 (N.J. App. Div., filed Jan. 9, 1974). In the court's judgment, however, defendants had failed to demonstrate that such a showing was impossible or that "as a matter of law . . . there is a reasonable and fair justification for the alleged inequities and discrimination." *Id.* at 7. Accordingly, the court was "satisfied that plaintiffs [had] presented questions of such a serious and substantial nature as to require development at a plenary trial." *Id.*

The plenary trial will take place shortly. The state court's subsequent decision in *Bonnett* will begin to provide important insights about how far state courts might be willing to extend state equal protection doctrine. An extension to state-mandated services need not mark the limit. In *Robinson*, the New Jersey Supreme Court lent some support to ultimate extension to the entire range of governmental services delivered or funded by local government. It stated that "ultimately all services characterized as 'governmental' (rather than 'corporate') are furnished pursuant to the obligation of the State, the municipal corporation being the State's agency or arm to render the service on its behalf." 62 N.J. at 496, 303 A.2d at 285.

But even assuming such extension of the equal protection clause, the issue remains what must be equalized. Is it tax burden or is it the service provided? If the latter, is equality measured by "input" or "output?"

In most of the recent school finance cases, "fiscal neutrality" has been the dominant equal protection theory. In its pure sense, the theory would equalize *tax resources* so that every governmental unit which taxed itself at the same rate would be guaranteed the same amount of tax revenue. It would not equalize *educational services* because school districts could elect to tax themselves at different rates. However, many courts have engrafted on the theory an equalization of inputs requirements.

A case like *Bonnett* looks even more clearly to equalization of tax burden. There was no complaint at all that the services in question were unequal or inadequate. In *Robinson*, on the other hand, the court converted the education clause into a kind of equal protection clause for children and focused on dollar inputs as the only viable criterion before it for measuring whether equality of educational opportunity was being afforded. The court also suggested the pertinence of outputs, or educational performance, to the constitutional mandate but there is no basis for believing that unequal outputs alone, would be a violation.

The input-output dichotomy is likely to be germane to other public service equalization as well. The issue has already come up directly. In *Beal v. Lindsay*, 468 F.2d 287 (2d Cir. 1972), involving alleged discrimination in the maintenance of a public park, the court ruled that input rather than output was the proper equality measure. So long as New York City invested at least equal dollars, personnel and other inputs in the park located in a predominantly black and Spanish section of the city, the equal protection clause was satisfied. This was so, even though that particular park might in fact be less clean and in a state of repair inferior to other parks because of greater vandalism. (Further discussion of judicially manageable standards for measuring equality in the delivery of various services is found in the section on intergovernmental remedies.)

With these lessons in mind, public service equalization efforts can use the school finance reform experience both as a springboard and as an important set of guideposts. Neither deep pessimism nor wild optimism is likely to be justified by this reliance. But hopefully, some of the more promising possibilities can be illuminated. (Additional information on school finance litigation is available from the Lawyers' Committee for Civil Rights Under Law.)

Legal Problems and Strategies

A major concern of the conference was the development of strategies for making public service equalization litigation more effective.

This discussion was chaired by Boston attorney Jonathan Shapiro, author of the NAACP Legal Defense Fund's litigation manual and a participant in the *Shaw* case. Citing the desire of many lawyers involved in equalization litigation to move from cases based upon racial discrimination to such other grounds as economic discrimination, Shapiro urged restraint, maintaining that racial discrimination provides far broader grounds than may yet be realized.

Minority groups throughout the country, he argues, suffer far worse discrimination, as a class, than do poor people. In addition, economic discrimination is, in many cases, itself based upon underlying racial discrimination. To demonstrate the racial roots of economic discrimination, Mr. Shapiro suggested that an action might be brought challenging a special assessment situation in a southern community, "someplace where people don't get paved streets or some other services because they can't pay for them. But they can't pay, and it is very clear they can't pay because for generations they haven't had the education provided by the city or the county or been given equal employment opportunities by the city or the county."

Mr. Shapiro is convinced that this kind of situation exists in many areas where a combination of similar discriminatory factors limits the ability of minority groups to purchase services. And it is in this direction that he would look to expand the scope of the *Shaw* decision, for the law is far more favorable to cases based upon race than to those based upon economics. In the context of disparities resulting from differential treatment of different racial groups, one can argue convincingly that it is the burden of the municipality or county to justify that disparity by some compelling or substantial reason. Since, as Mr. Shapiro pointed out, the problem now is to develop the theories and find the cases in equalization litigation, he recommends looking for cases that are based on race or where racial underpinnings can be found.

Inequitable service delivery systems can also be challenged by arguing that the method selected by the state for delivering the services in question not only discriminates among population groups but is also without rational justification. To support this argument, attorneys would have to demonstrate that the challenged system is irrational in its effect and that other, less discriminatory alternatives are available to the state.

LARGER CITIES

Applying the principles of *Shaw* to service inequities in larger cities has been a major concern of the Legal Defense Fund; efforts towards that end have concentrated on acquiring the resources and the means to research such a project. Constructing a statistical model so that sampling several areas within a city would provide sufficient data to statistically establish discrimination is one proposed approach, while limiting the inquiry to a specific kind of service is another. (At least one suit has been filed in a large city. *Burner v. Washington*, DDC CA 272-71, filed by black residents of the Anacostia section in Washington, D.C., against a number of city officials, has already resulted in significant improvements and may be settled.)

But the conference participants were not unanimously enthusiastic about the chances of a big city equalization suit succeeding. Heavy municipal expenditures in minority areas during the past few years were cited ("Many services in big urban centers are pro-poor"), as were the problems raised by the *Beal* decision in which equal input (of funds, manpower and effort) was sufficient to frustrate arguments of discrimination, not withstanding disparities of output.

The approach to municipal services in large cities that provoked the most speculation by the conferees was the notion of taking an inter-municipality approach, similar to the strategy followed in school finance litigation, rather than seeking intra-municipal disparities. ("One way of looking at the problem in the Northeast is not to try and find one pocket of people in New York City who get less service than others – by input, output or both – but to ask if New York City, as a whole, has services comparable to the surrounding suburbs.") An inter-municipality argument, however, cannot be made in a purely racial context.

ASSESSMENTS

Because so many communities finance such services as paving, the construction of sewers and the laying of water mains by special assessment (either directly or through private corporations or utilities), rather than from general revenues, such levies are a major concern of equalization litigation. The following view of the problem was included in the paper prepared by the NAACP Legal Defense Fund.

> When a city actually finances a particular service such as sidewalks and street paving by assessing the benefitted landowners, the city can be expected to contend that the disparity results from the failure of the minority or poor residents to avail themselves of the special assessment procedure. (For example, see *Citizens for Underwood Equity v. City of Seattle*, 492 P.24 1071 Wash. App.) This can change the issue from race to poverty, where the constitutional test presently appears to be quite different, for the compelling state interest test has not been adopted in "wealth" cases.
>
> The question of special assessments is a particularly thorny one. There are three ways of approaching this question. First, one can go after disparities in the services provided if varying qualities are evident (whites get asphalt streets while blacks only get sealed gravel) or if white areas are maintained at a higher level. Second, the assessment can be attacked on its method of application. An example of this would be a recently enacted special assessment plan put into effect after most services and facilities in the white areas have been provided through public funds that now acts to "freeze in" the past disparity. Another example would be a situation where special assessments are officially in effect but have not been collected in the past. Finally, there is the direct attack on the whole assessment scheme, where it is clear that this practice has had and continues to have a discriminatory impact on the minority community. This is clearly the most difficult approach to take because it challenges the underlying rationale of the special assessment as a means of raising local revenue. It is likely to produce a favorable judicial response only if the service involved is essential to health and well-being, like sanitary sewerage or fire protection. There may also be ways of attacking the use of assessments by pointing out that the minority community contributes to the general revenue funds, and such funds

are expended to *maintain* services and facilities in the white community but, because of the use of assessments, the minority community gets neither the services nor the benefits of its tax revenues.

Although special assessments have yet to be effectively challenged in court, a great many cases involving such assessments have been settled on terms of considerable benefit to the plaintiffs. Examples include the Legal Defense Fund's own successful efforts to secure paved streets for the residents of Sanford, Florida, and Allison Brown's experience in the *Fairfax County* case. In addition, several other Conference participants cited instances in which special assessments were reduced after negotiations or collected over a period of time. It would seem that although special assessments have not yet been successfully challenged directly, they are sometimes negotiable, once litigation is underway.

STATE REMEDIES

Throughout the discussion of legal remedies, a major theme was the possibility of challenges based on state constitutional or statutory grounds. Some conferees suggested that if the denial of public services cannot be designated a violation of a fundamental interest by the federal courts, then there should be ways to remedy these inequities through the state courts. State constitutions may have public safety or welfare clauses with sufficiently broad and mandatory language; in addition, state statutes frequently mandate police and fire services that are dependent upon such other services as street lighting, fire hydrants and adequate water pressure. New state environmental protection laws ("broad and beautiful," they were called) were also proposed as a possible vehicle for such actions, as were laws regulating planning and imposing minimal standards on the recipients of certain state grants.

During discussion of an inter-municipality approach to equalization of services, it was pointed out that local government is a creation of the state. If the local government system of providing public services isn't working equitably, is that not the state's responsibility? Similarly, it was contended, that since the states can set standards and mandate requirements for public service (and they have become increasingly active in this area), do they not also have the ultimate responsibility for such services? In the light of these questions, it seemed to many participants that the states have special responsibilities to residents of areas deprived of services by detachment, failure to annex or because of some other exclusionary practice.

One specific suggestion was the possible use of a constitutional provision common to most states -- the prohibition against private, special or local legislation -- in equalization actions. State statutes that empower local governments to raise revenue for specific purposes might well be vulnerable to such an attack. Since some communities are less able than others to avail themselves of the statutes' benefits, they are, in effect, special and local.

In general, there was a strong consensus that the strategies available under state constitutional and statutory provisions had thus far been largely unexplored by litigants.

Intergovernmental Remedies

Focusing on the jurisdictional complexities of local governments, John J. Callahan, a senior analyst for the Advisory Commission on Intergovernmental Relations (ACIR), noted the problems many communities must overcome in order to deliver equitable public services. The ACIR has recently completed a six-volume study of local government reorganization, and Mr. Callahan's paper "Intergovernmental Remedies for Intrajurisdictional Equity Problems," was based, in part, on the finding and recommendations of that study.

THE DIMENSIONS OF THE INTRAJURISDICTIONAL EQUITY QUESTION

Current litigation seeking intrajurisdictional service equity may produce new legislative and administrative policies for the disbursement of local public services. To be successful, however, litigation needs to be based upon a clear understanding of the service and jurisdictional complexities of the American federal system. With better knowledge of the public service delivery process and more awareness of the jurisdictional complexities of urban governmental systems, lawyers will be able to both bring more forceful litigation to bear and suggest more constructive legislation to remedy this often ill-defined problem.

It is the contention of this paper that the nature of the service in question and the jurisdictional setting in which the service equity question is raised should be the key determinants of both legislative and judicial remedies for the public service equalization problem. Different equity rules and different legislative remedies are both desirable and necessary for different intrajurisdictional service allocation problems.

SERVICE EQUITY: SOME CURRENT FINDINGS

Two landmark cases have been decided in this area: *Hawkins v. Town of Shaw,* involving a range of municipal services, and *Hobson v. Hansen,* dealing with educational services. Both cases found considerable and purposeful intralocal discrimination in the provision of public services. However, other research has produced more varied findings. Benson and Lund [8],* for example, found considerable service variation in the City of Berkeley with human resource (pro-poor) services being redistributed from rich to poor neighborhoods while other developmental services were redistributed from poor to rich neighborhoods. Thus, both rich and poor received some service redistribution. Other studies have found little evidence of racial discrimination in service provision [1, 4, 13] though other factors such as housing values, population density, and home ownership (often indirectly related to race) were found to be significant predictors of intralocal service variations [1]. The data on school district resource allocations offer more concrete evidence of significant intralocal resource discrimination, though often more related to considerations of class than race [11]. Finally, data developed by ACIR [15, 17] indicate that counties often fail to provide services throughout all of their jurisdiction although they finance these same services from countywide revenues.

Taken together, these findings suggest that considerable variations in service allocations exist within municipalities, school districts, and counties. All three types of jurisdictions have actual or potential service equity problems. What remains to be learned is how severe or complex each problem is, how amenable it is to judicial review, and how susceptible it is to resolution by some form of legislative remedy.

*References for this paper will be found at the end of the chapter.

THE FIRST DIMENSION OF THE EQUITY PROBLEM: THE SERVICE IN QUESTION

The first step is to examine the service in question and define an appropriate standard of equalization. On common sense grounds, it appears that different services should be distributed within a jurisdiction according to different principles. Where the outcome of a service delivery process can be easily measured, as it can in many hardware or physical development services, similarly situated areas should receive approximately equivalent services. Thus, neighborhoods with equivalent residential densities and traffic volume should receive not equal highway expenditures per capita or per household unit, but roads of fairly equivalent quality.

More complex services and their components might have different allocation rules. Basic police services, for example, might be allocated according to one criteria – so many patrolmen per capita or sufficient patrolmen to respond to police calls within a specified time period [4] – while other support services could be allocated according to some other measure, perhaps on the basis of the incidence of serious index crime. More complex human resource services might have still other allocation rules. Education, for example, might benefit by the development of equity rules that mandate not merely equal expenditures but equivalency in service inputs; that is, permitting different schools within a district to have the same mix of input variables, whatever their cost. Here unequal expenditures would occur, but the organization of service inputs would be similar, even if this did not absolutely guarantee substantial improvement in educational outputs.

Finally, equal dollar allocations could be the service rule where there is relatively little variation in the service delivery process (*i.e.,* street lighting), and outputs are fairly straightforward and subject to only minor variations. In these situations, equal dollar allocations may be a reasonable standard rather than a demand for equivalent inputs (education) or equal service outputs (roads), both of which may cause considerable dollar variation in service allocations throughout a jurisdiction.

A SECOND DIMENSION: THE JURISDICTIONAL SETTING

Another consideration in the service equity issue concerns the jurisdictional level within which a service is disbursed. Considerable attention has been paid to the service allocation problem within a unitary jurisdictional setting – a municipality or school district. Increasingly, however, local services are being provided within a more complex and overlapping jurisdictional context. Rules for service equity must be modified to take account of these situations.

The service equity question within a county, for example, is of increasing interest. Counties often do not provide their services within incorporated areas even though most of their taxes are countywide [15, 17]. Municipal areas, then, sometimes are deprived of county services. In other cases, counties may provide a

variety of services through subordinate service districts – some 6,200 in 21 states. We know very little about the conditions under which these districts are created and whether they are mechanisms that sometimes permit service or wealth segregation within a county area. Certainly, states need to assess this problem in the same manner that some have been viewing the problem of local government creation and growth [10, 17].

Special districts may also be vehicles for inequitable service practices since they must often give priority to meeting the fiscal demands of bondholder interests rather than to provide services equitably. Additional issues include the expenditure of funds provided by higher levels of government – revenue sharing being an example – which have been disbursed on the basis of a jurisdiction's overall taxing effort. County or municipal procedures that produce interjurisdictional price discrimination should also be examined [22].

Even below the county level, there are complexities to the equity question that have been only partially explored. Towns and villages overlap in several states and little is known about the service allocations within these jurisdicitons. Cities, as well as counties, often create subordinate service districts. The conditions under which these units are formed and their effect on service allocations must be better understood. More explicit rationale for the creation of administrative service districts should be demanded by lawyers and legislators interested in the service equity question.

The difference in jurisdictional-setting significantly affects the choice of litigation and other legal remedies to the service equity problem. For example, the ACIR has recommended that, in cases of concurrent service provision, counties supplement municipal services in a manner agreed to by the constituent municipalities. Consequently, constituent municipalities would have the option of requesting the additional types of service they felt should be provided within their jurisdiction or of asking for payments in lieu of county services. Such an approach is patterned after the recent Pennsylvania home rule bill and is county policy in Montgomery County, Maryland.

In cases dealing with local transfers of function, similarly constructive approaches may be taken. For example, the ACIR [17] has recommended that while the states should provide greater incentives for this type of cooperation, the parties to the transfer (towns or municipalities) should explicitly set the terms of service provision and be able to withdraw or adjust service provision when an independent third party – a sort of service ombudsman – adjudges that the provision of the service has not served the interest of the affected party.

The ACIR has called for equally innovative service allocation measures in other contexts as well. In its recent report, *State-Local Relations in the Criminal Justice System*, the Commission recommended that metropolitan municipalities assure 24-hour basic police protection to their citizens directly or by contract with another level of government. Failing that, higher levels of government, the state or county, could be mandated to assume provision for the service with appropriate costs being reimbursed by the affected local government. Attaching conditions to the provision of state funds and services could be pursued if definable and acceptable standards of equity were developed. Statutory mandates, such as that contained in Virginia's recent standards of quality for education (requiring the equal distribution of resources), might also prove to be another incentive to more equitable local service provision.

The need for structural reform at lower levels of local government should also be considered. Recent reorganizations in Indianapolis and Nashville, for example, have suggested that one of the first demands of a centralized government is the administrative decentralization of services. Thus, we have a system of "mini-governments" in Indianapolis; general and urban services districts in Nashville, Jacksonville, and Indianapolis, service allocation disputes in Miami-Dade and the rise of neighborhood city halls and decentralized school districts in many other large American cities. All these developments suggest the need for at least a quasi-governmental level of government at the neighborhood level, a prime concern of which would be an assessment of the intrajurisdictional service allocation policies [20, 21]. Structural advances of this sort have also been recommended by ACIR [24].

All these structural reforms would permit better assessment of service equity problems while simultaneously creating a set of flexible policy instruments to meet these problems in different ways.

EQUITY RULES AND THE SERVICE ALLOCATION PROBLEM

The last component of the intrajurisdictional equity problem concerns equity rules for the delivery of different services. Clearly, both general equity rules, equal treatment of equals and unequal treatment of unequals, are relevant in fashioning intrajurisdictional service allocation policies. A horizontal equity rule seems most appropriate when there is little demand or necessity for service variation. Every individual in a jurisdiction, for example, should have equal access to pure water to drink. In the same fashion, every person should expect roughly equal response time from local police and firemen.

On the other hand, it is abundantly clear that some service allocations within a jurisdiction also should follow the vertical equity or unequal treatment of unequals rule. In education, compensatory programs of some kind are clearly needed for low-income populations. Similarly, police and fire services may be required at higher levels in business districts than in residential areas. These situations call for an unequal distribution of services within a jurisdiction.

The most difficult problems in service allocation occur with the multi-product service. Transportation and education are two oft-cited examples. These services have numerous facets. Education has a variety of cognitive, affective dimensions [2]. It relates to political, economic, and social well-being as well. Transportation has dimensions that relate to service cost, accessibility, safety, speed and environmental quality [15]. It is exceedingly hard to balance these components, much less choose equity rules and provide equalized service within a jurisdiction, without better information from both a technical and a consumer viewpoint.

What, then, are the contexts in which the different equity rules are relevant? Clearly, human resource functions are more amenable to compensatory service allocations due to the variations in need for such services. Also, multi-product services, where different mixes of services may be desired or demanded at the neighborhood level, may call for unequal treatment of unequals. More conventional equity may operate when services are not of a multi-product nature, when they are being provided within a relatively homogenous setting (*i.e.*, a middle-income, highly residential suburb) or when the service has a constant,

continuous, identifiable production function (*i.e.*, refuse collection) which suggests there are limited options to provide these services effectively.

THE INTERJURISDICTIONAL DIMENSION OF INTRAJURISDICTIONAL SERVICE EQUITY PROBLEMS

It is naive to expect that intrajurisdictional equity problems can be solved by local measures alone. The extensive research work of ACIR on the structural, functional and fiscal maladies of metropolitan governance systems suggest that much of the reason for service equity problems occurs as a result of the fiscal pressures placed on local governments in their interjurisdictional settings [19, 17]. Long-term solutions to interjurisdictional fiscal disparities have to be considered for their salutory effects on intrajurisdictional equity questions.

Higher levels of government are the logical levels at which concerns of fiscal if not service equity should be met [18]. When the buck is passed to lower levels of government, the pressures for redistribution of services and tax burdens often become too onerous for local governments to handle. Either they meet this demand and gradually experience a loss of taxable wealth or they deny it and subsequently have to deal with interminable urban crises produced by dissatisfied urban residents. Put quite simply, lawyers will be doing a serious disservice to resolution of this equity problem if they press for intrajurisdictional equalization policies without being sufficiently aggressive about the adoption of equalizing federal and state intergovernmental aid policies. Without such policies or other innovations like regional tax base sharing, cities are unfairly asked to handle service redistribution problems that may be beyond their fiscal capabilities [2, 8, 19].

Intrajurisdictional equity questions are part of wider functional assignment considerations as well. Some jurisdictions cannot equitably provide a service because of its excessive cost. Sometimes, they inequitably provide a service since its costs are imposed by other jurisdictions [25]. In either case, the financing or delivery of essentially redistributive services might be better handled by a larger, more encompassing jurisdiction, although subject to some form of local control [20]. Structural, fiscal and functional assignment reforms of the type recently recommended by ACIR [16, 17, 18, 19, 23] are necessary measures if the fiscal pressures on and within urban and rural municipalities are to be successfully withstood.

The price/tax differentials of local services within and between metropolitan local governments are a clear indication that many service equity problems are created by artificial and outdated local governmental practices. Legal challenges are necessary to highlight the gravity of many local public service equalization problems. Legislation of the type recommended by the ACIR offers some practical solutions to many of the problems being grappled with here. ACIR's analyses and model legislation can be helpful in finding constructive and long-term solutions to the service equity problems that all too many American local governments are now facing.

CONCLUSION

Judicial and legislative concern about the service equity problem should take note of the following:

a. The equity problem has innumerable facets, some particular to the service or its distinct components, some to the jurisdictional structure in which the services are delivered and some to the relevant equity rules for service allocation.

b. Better knowledge about actual intralocal service discrimination is needed, particularly about the conditions that produce service disparities within a local jurisdiction.

c. Legislators at all levels should demand better local reporting of intralocal service provision. Moreover, higher level aid might be earmarked for particular areas within a jurisdiction where the service equity problem is a serious one. Thus, state educational aid systems might follow Florida's lead and credit state aid to the specific school wherein it is earned rather than to the school district as a whole. Similar devices might be instituted for non-educational services.

d. Higher levels of government should take immediate and forceful steps to ease the fiscal disparity problems of urban governments. Increased non-educational aid programs, regional tax base sharing, and state revenue sharing programs designed to equalize local fiscal pressures are but some of the devices that higher levels of government should institute to meet this problem.

e. Finally, resolution of the intrajurisdictional equity problem may require such policies as state review of subordinate or independent special district creation, administrative arbitration of service problems encountered in intergovernmental service agreements and transfers of function, more interlocal service cooperation and the institution of quasi-governmental neighborhood units in large cities or reorganized urban governments. These are all key policies in the ACIR's recent and past prescriptions for metropolitan governmental reform.

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Problems of Fact and Fact Finding

This discussion, chaired by John Callahan, centered on two questions. First, how can one locate, at long range, specific situations that reflect serious service denials or inequities and provide the basis for successful litigation? Next, how can the factual proof for an equalization case be best developed, once the decision to litigate has been made? A major participant in this discussion was Mr. Yale Rabin, a planner and a leading consultant in equalization litigation, who helped prepare the case in *Hawkins v. Town of Shaw.*

There was general dissatisfaction with the present procedure for locating equalization suits. The NAACP Legal Defense Fund and other groups in the field remain dependent upon cases brought to them by local attorneys or local citizens. Too often these reflect the presence of activist community or legal groups more than they reflect the presence of severe service inequities. Further, this process does not facilitate the systematic selection procedure needed if the problem is to be addressed on other than an *ad hoc* basis.

The conferees agreed that before undertaking a case search or survey to determine where feasible equalization suits exist, there is a need to determine what kind of suits it would be best to bring. Once there is agreement on the geographic areas in which litigation is desirable, the kinds of problems, and the kinds of communities where suit should be brought, then it would be possible to start identifying appropriate sites.

In addition to the problems of locating appropriate sites for litigation, several additional issues were discussed including the need to develop more objective indicators of service quality, the desirability of codifying informational resources and techniques for analyzing the distribution of public services, and, finally, the need for a multi-disciplinary approach to the preparation of background studies and basic research aimed at providing supporting data for litigation.

In the short run, the most effective equalization cases, and thus the most promising sites for litigation, will be those involving total denial. Until there is additional research devoted to the development of standards of minimally acceptable services, it will be difficult, if not impossible, to substantiate claims of inequities. In many instances, there are good reasons for intra-city disparities in service levels (such as variations in terrain, population mix or density, age and quality of buildings). The need at the present time is for more objective indicators of service quality, particularly standards of minimally acceptable levels of key public services.

Such organizations as The National Academy of Public Administrators, The National Science Foundation, The Urban Institute and The U.S. Commission on Civil Rights may be useful sources of data on discriminatory allocations of service. Some of these groups have recently developed sophisticated tools to measure service levels in urban settings.

A great deal of information on public services already exists. Assuming that standards and indicators can be developed, there will still be a need to pull together the many data sources describing service levels that are currently available. Various local, regional, state and federal agencies collect information on a regular basis that might be used to document changing levels of public service availability. At the moment, each agency and level of government collects information at different time intervals and for varying geographic areas. Additional work will be needed to prepare guidelines for the use of these informational resources. It is not enough just to identify these data sources; specific instructions must be prepared that will help various groups around the country to develop their own preliminary assessments of service delivery levels. This could provide valuable input into preliminary decisions by legal aid groups as to whether or not to pursue particular equalization cases. A relatively simple checklist with instructions regarding the use of basic data sources and their interpretation would be an important screening device and would assist in the selection of appropriate equalization cases.

Issues of service quality have been ignored for too long. Very little effort has been made to study trends in service delivery or to piece together case histories of public service standards in cities and towns throughout the United States. It is not enough to spot cases of service inequities or even to prosecute when intentional disparities are found. Strategies for financing public service improvements, for regionalizing certain services, or for reprivatizing services that can be handled more efficiently on a decentralized basis all need to be examined in depth. The conferees agreed that additional research along these lines ought to involve a mix of academicians, professionals, and citizens' groups. Research of this sort is a necessary prerequisite to further equalization litigation.

A number of participants warned that access to vital information might be denied equalization lawyers or researchers. Although such data is often provided freely before local officials become aware of a possible suit, there are instances when the only way to obtain the facts is to file suit and attempt to secure the necessary material through discovery. The danger in this practice is that weak cases, likely to produce unfortunate precedents, may be brought by attorneys insufficiently aware of the factual situation before the discovery process has begun. The possibility of Freedom of Information suits to gain access to basic public records was proposed as a possible solution.

As an aid for attorneys involved in equalization suits, Mr. Rabin has prepared a paper on "Documentary Resources Available for Recording and Evaluating Disparities in the Provision of Municipal Facilities" (Appendix A). Additional information on developing the factual proof, once an equalization suit has been filed, is found in the Legal Defense Fund's *Litigation Manual for Equalization of Municipal Services.* (See Chapter III, "Discovery and Preparation for Trial" pp. 48-73 and Appendix 3, with its sample interrogatories to defendants in the *Manual.*)

Reasonable and Literal Remedies

This session, chaired by Yale Rabin, opened with a presenation on remedies in equalization suits from a planner's point of view. As Mr. Rabin noted, disparities in municipal facilities and services rarely exist independently of other adverse conditions that are not the subjects of litigation. Yet these other conditions should be considered in devising remedies for the disparities in municipal services.

To date, most equalization suits have been brought in localities characterized by deteriorating housing, inadequate rights of way, unusual isolation of those deprived of services from other residents of the town and only limited local back-up service capacity. Often, underserved neighborhoods are characterized by such adverse environmental conditions – other than those created by the deprivation of municipal facilities – that it hardly seems reasonable to provide municipal services.

In Shaw, one unpaved street had on it only a single house – a house, Mr. Rabin noted, that was "falling down." Were the house to be removed, as Mr. Rabin suggested it should, then there would be no need for a street. But the "literal remedy" in this situation would be to put in water lines, a storm sewer and pave the street.

In Itta Bena *(Harris v. Town of Itta Bena* was a companion suit to *Shaw*), there were several streets where the right of way was only eight feet wide. While paving these streets would make things more convenient for the families who lived on them, it would not provide access for school buses, fire engines or ambulances.

Also in Itta Bena were two families living on an island between two bayous. The families received no public services, and a literal remedy would have required the town to build a bridge to the island, as well as to bring water and sewer lines there – crossing not only one of the bayous but a railroad line as well.

A problem caused by inadequate back-up also existed in Itta Bena, where water from the town's storm sewers flowed into the bayous. If the black sections of town that were not served by storm sewers were to be so served, the resulting rapid run-off would cause the bayous to overflow and flood part of the town. It either required dredging of the bayous by the U.S. Corps of Engineers someplace beyond the town limits or the construction of a huge reservoir.

Adverse environmental conditions made the literal remedy to deprivation of municipal services a dubious enterprise in one black area of Birmingham, Alabama. Here, in an area adjoining the U.S. Steel plant, the corrosive effects of air pollution were dramatically illustrated by the appearance of the homes. Paint would not adhere and wood was literally eaten off the sides of houses facing the plant's smokestacks. More significant, however, was the local incidence of tuberculosis – 40 times the national average. Although the area lacked municipal services, Mr. Rabin questioned whether it would be advisable to provide them. Preferable remedies would be relocation of the residents or a major pollution control effort at the steel plant.

What Mr. Rabin proposes in situations like these are negotiations with the defendants aimed at achieving a reasonable if not a literal remedy to the problems. In Shaw, where a number of situations were similar – but not as extreme – to the street with the single, ramshackle house, negotiations also involved the Department of Housing and Urban Affairs, which was prepared to designate nearly all of the town as an urban renewal area. This would have allowed relocation of black families within the town, eliminating the need for unreasonable solutions and also modifying racial isolation. Under such an arrangement, federal funds would have been available to aid the relocation effort. The plan, however, dissolved when HUD funds were impounded prior to completion of the agreement.

Similarly, in Itta Bena, a federal water and sewer grant and an open space grant would have provided funds to construct a huge reservoir and an adjoining park. This would have resolved the run-off problem and permitted a storm drainage system to be installed in the black neighborhoods. Again, federal funds failed to materialize.

Often, a reasonable rather than a literal remedy can be worked out directly with the town itself, particularly if outside funds are not needed for the town to benefit economically from the arrangement. For example, in the case of the single-house street, it would obviously cost the town less to relocate the family than to provide them with municipal services. However, in most instances, a reasonable solution from a planning point of view will be more costly than a literal remedy. Mr. Rabin urged lawyers to negotiate and explore the possibilities of outside funding through revenue sharing or whatever federal grant programs are available to the town. By fully researching this area, plaintiffs' attorneys can forestall the standard "lack of resources" defense.

Understanding the town's financial situation is an important part of any negotiations, and Mr. Rabin considers *Shaw* an unfortunate precedent in this regard, for the town – unlike most municipalities – had been operating with a surplus of revenue and was actually investing its money. "We were able to tell the court that we knew that, without raising taxes or floating bonds, they would be able to do these things in X number of years." Similar circumstances are unlikely to exist in other localities where service disparities are found.

Several participants at this session questioned the need for lawyers in equalization cases to become involved in the defendants' financial problems. The point at issue, they noted, is not what the town can afford to do but what it is required to do. If the court decides that the defendants have a constitutional or statutory obligation to provide service, then they must – no matter what the cost.

Mr. Rabin contends that a reasonable solution, not a literal remedy or a vindictive judgment, is what one should seek. Because reasonable solutions are often more costly than literal ones and usually more than the town alone can afford, the plaintiff's attorneys should make efforts to locate outside funds. Indeed, noted Mr. Rabin, he has been involved in cases in which the request for relief included suggestions that the town be required to apply for certain federal funds available to it.

The final order of the court, detailing the required remedial actions in Shaw, Mississippi (Appendix B), is an example of the appropriate kind of remedy in service equalization litigation. (See also the Final Order in *Harris v. Town of Itta Bena* in the LDF *Litigation Manual,* pp. 347-360.) However, where the state is a defendant and the challenge is to a statewide system of providing public services, broader remedies, including remedial legislation, will be required.

Strategic Priorities

Generally, the conferees agreed that service equalization suits were the beginning of a new reform movement that could radically alter the manner in which municipal services are delivered in this country. To be effective, equalization litigation must be just as carefully planned and coordinated as were the legal efforts that led to the *Brown v. Board of Education* or the *Serrano v. Priest* decisions.

Chairing the priorities panel, Harold Himmelman outlined options. First, dividing them into litigation and non-litigation approaches, Mr. Himmelman listed under litigation:

a. *Shaw* type cases. Bringing additional cases in all the federal circuits would be a time-consuming but essential step towards the clear establishment of the *Shaw* principles. It would also directly benefit thousands of Americans.

b. Revenue sharing cases. The advantages and handicaps of a revenue sharing approach is the subject of Mr. Himmelman's paper in the LCCRUL section of this report. Although the federal revenue sharing statute includes some potent incentives for municipal action, it requires that administrative remedies be exhausted before suit can be brought and may involve battles with the very federal officials obligated to enforce the statute's civil rights guarantees. As Mr. Himmelman allowed, if the case the Lawyers' Committee has brought in Louisiana were to go the full administrative legal route, it is possible that there would be no remedy prior to the expiration of the Revenue Act. However, if revenue sharing is to be the primary conduit for federal grant funds, then guarantees of equal service delivery must be integrated into the program.

c. Cases based upon economic discrimination. Both *Shaw* type cases and revenue sharing cases depend upon racial motives or impact. But some equalization problems cut across racial lines. The problem is how to get the U.S. Supreme Court to find economic discrimination just as suspect and constitutionally impermissibe as race classification. And, if that is to be done, how is it to be done? Can cases of total services deprivation to poor people be identified and successfully litigated? If that is done will relative deprivation also be subject to judicial scrutiny? Mr. Himmelman included, as a related question, the issue of assessments ("which goes hand in hand with economic discrimination"). But he asked if assessments were not a subterfuge for racial discrimination or could not be approached as economic discrimination that has a disproportionate impact on minorities. Whether or not to argue the issue of annexation and discriminatory boundary changes in a similar manner was another question Mr. Himmelman raised at this point.

While recognizing the need for some kind of coherent strategy, the chairman admitted, "We might well decide to do everything." He moved on to ask next: "Is litigation worth the effort, or is it time we asked Congress to respond, as we did in 1964 (with the Civil Rights Act)?" Another possible alternative to litigation, in addition to legislative action, is citizen pressure, the organization of local groups to lobby and bring pressure on local government to equalize services on their own.

The discussion during this session covered ground that had become familiar through the course of the Conference. There was widespread, if not general, agreement that legal strategy should be built upon *Shaw*. The question of special assessments was considered a major target. Whether the arguments used to challenge assessments were based upon racial discrimination disguised as economic discrimination or economic discrimination that disproportionately penalized minorities did not loom as a major issue, for either strategy would be built upon the racial grounds staked out in *Shaw*. "If you make the argument of racial impact resulting from economic classification," said Jonathan Shapiro, "the burden is on the government to show there is some compelling interest in there being that kind of economic classification. Although it is *rational* for people to pay as they go, it is more difficult to justify that as a compelling interest. It's hard to say that assessment is such an important way of financing government that it can't be done any other way." As Mr. Shapiro perceived such a case, "That's the opening wedge," and it would expose new areas of equalization litigation.

The further implementation of *Shaw* did not rule out other priorities, and the conferees agreed that among the more pressing concerns were:

a. Actions brought in state courts and based upon state constitutional and statutory provisions;

b. Research to support state court suits to discover the extent, variety and location of inequality in public services, to develop performance standards for making judgments about the adequacy of municipal services;

c. The question of the *Rodriguez* decision which should not be allowed to stand unchallenged.

To the question of whether litigation was not too costly and time-consuming an effort toward an end more easily achieved by political action, several conferees cited the example of school finance reform. Litigation in that area, despite its setbacks, was credited with a significant impact upon public attitudes and upon the actions of the several state legislatures that recently changed their states' school financing systems.

Finally, the participants agreed that equalization attorneys should heed the injunction usually given to doctors: "First, do no harm." The most important consideration must be to avoid bringing actions that result in a net loss for the effort. The example cited as a less than helpful case was *Beal v. Lindsay*, with its doctrine of equal input regardless of output.

An Action Agenda

The final Conference session, chaired by Marge Benjamin, assistant deputy for development of Trinity Parish, focused on future cooperative efforts by the Conference group. Sarah Carey, the conference director, began by recognizing that the embryonic nature of the equalization effort makes it impossible to determine, at this point, the most desirable goals, positions and strategies for the next decade. However, the group could hopefully expect to agree upon the steps needed to reach the point where such a determination could be made. The importance of the litigation movement to poor and minority citizens of the nation makes it crucial to develop such a long-term strategy.

Two strategic imperatives were voiced by the participants. Several conferees felt that, regardless of its limitation to a purely racial context, the *Shaw* precedent must be pursued. Not only will such cases improve the lives of minority Americans; they will also help to solidify the constitutional precepts embodied in *Shaw*. A second course of litigation, based upon state constitutional or statutory grounds, was also stressed. It was felt that both these strategies would provide a "ripple effect" and create considerable public and political awareness of the equalization issue.

There was general consensus that a "clearinghouse" or center to undertake legal and factual research, facilitate communication and generate public information in the field of public service equalization litigation is needed. Such a clearinghouse could either be created as an independent entity or as a function of an existing legal or research organization. Mr. Rabin, who initiated the discussion, suggested that such an agency provide research on state constitutional and statutory grounds and gather data to identify sites of public service inequities. He specified that the clearinghouse be supervised by a panel representing various litigating organizations. During the discussion that followed, there was general agreement that the clearinghouse be designed to serve or supplement rather than direct the litigating organizations, which would remain autonomous and free to pursue their individual interests.

Most participants agreed to the proposed functions of such an organization. Research would be basic, particularly to provide factual support for litigation. Technical assistance, such as the referral of expert consultants, would be another means by which the clearinghouse could directly serve attorneys in the field. But more broadly based research and the publication and dissemination of information would also be among the agency's functions. Not only would the organization publish reports for lawyers, but technical articles for other interested professions (planners, engineers, environmentalists), as well as popular material designed to increase public and community awareness of equalization problems and solutions. With the existence of a clearinghouse, several conferees hoped there would be more opportunity to contact and advise individual attorneys involved in equalizations litigation. Such communication could help prevent ill-suited cases from being brought only to result in unfortunate precedents. Finally, because it would give new coherence to the field, the clearinghouse could help to facilitate the funding of litigating organizations.

The following preliminary proposal to establish a national center for the equalization of governmental services was prepared following the Conference by Sarah Carey, acting in her capacity as consultant to Trinity Parish, in an attempt to crystallize an approach to useful action on the issues discussed by the participants. This document, in an earlier draft, was distributed to those in attendance at the Conference and a variety of constructive comments and criticisms were received. The preliminary proposal, nevertheless, does not necessarily represent a consensus viewpoint.

PRELIMINARY PROPOSAL TO ESTABLISH A NATIONAL CENTER FOR THE EQUALIZATION OF GOVERNMENTAL SERVICES

The basic power for the provision of public services,[1] whether schools, police, lighting or water, rests with the states. In many states this power has been loosely delegated to a host of illogically drawn local governmental units that often have overlapping functions. In many areas the design of such units has little to do with either need or resources, except in a negative fashion, to the extent that local boundaries have been drawn to exclude poverty or problem areas. In addition, in many states basic services such as water or sewer systems are funded by "special assessments" or "private governments," resulting in a denial of services to districts that cannot afford such special levies

This irrational evolution of local government structures has resulted in patterns of acute inequality among neighboring jurisdictions in the availability and quality of public services. Frequently these inequalities follow racial lines; in other cases, they discriminate between poverty areas and areas of relative wealth. In either event the resultant deprivations are acute and dehumanizing. In the Texas Rio Grande Valley, for example, water is provided through private corporations known as WCID's (water control and improvement districts). The boundaries of these corporations have been drawn in such a manner that ample water supplies are available to the valley's rich citrus groves and their owners, but potable water is denied to the poor Chicanos who live nearby in *colonias* and who provide the workforce to harvest the groves. The result is high levels of amoebic dysentery, tuberculosis and other diseases among the *colonias*.

In Clarksville, Indiana, adequate roads, street lights, sewer systems and electricity are provided to most of the town but denied to the roughly 200 black residents of the Lincoln Park section, because of their financial inability to purchase such services from the privately owned utility companies to which the government has delegated these responsibilities. The refusal of both the city and the utility companies to act has resulted in a lawsuit.

Similarly, in Oachita Parish, Louisiana, service denials have led black citizens to file suit against parish officials alleging that they are provided "a poor and inferior level of municipal services," in regard to "road construction and maintenance, storm drain construction and maintenance, fire protection, traffic control and safety, sanitary sewage, and library services." The suit charges that such discrimination has been reinforced by the manner in which federal revenue sharing funds have been expended.

The power for insuring minimal standards of equality in the delivery of public services rests with the state legislatures.[2] For a variety of political and economic reasons, few state legislatures

[1] This paper uses the term "public services" to include all those services that have traditionally been provided by governmental agencies in this country; it does not include services such as day care that governments in other countries provide, but which remain primarily private in the U.S.A.

[2] Federal non-discrimination standards and case law have defined certain minimum standards where discrimination based on race is involved.

have been willing to undertake the reorganization of local government and local finance that is needed to insure intra- or inter-jurisdictional equality. Instead they have passively continued to delegate their authority in this area to inadequately designed local governmental and private entities.

Recognizing the legislative deadlock of the past decade, this proposal seeks to establish a non-profit center for the Equalization of Governmental Services. The primary focus of the center will be to develop binding definitions of minimal service equalization through the courts by coordinating, developing and supporting legal challenges to service inequities based on federal and state constitutional and statutory grounds. For the most part, the center will not engage directly in litigation itself, but will provide badly needed factual and legal research as well as assistance in the identification of experts and other sources of technical assistance for litigants in the field.

The proposal is an outgrowth of a strategy meeting of lawyers and planners convened by Trinity Parish (and supported by The Ford Foundation and The Irwin-Sweeney-Miller Foundation) on May 16-17, 1974. At that session the participants agreed that the development of appropriate and effective legal remedies was in an embryonic state; that such remedies had great potential for stimulating an overall reform effort to upgrade and equalize public services; and that the lessons learned from the school finance litigation reform movement of the past five years and from similar litigation efforts pointed to the need for the careful evolution of strategy, for the encouragement of related legal and factual research and for close coordination among lawyers, planners, public administrators and others possessing the resources to address the problem. This proposal is designed to meet those needs by providing some of the backup resources required to increase the effectiveness of significant litigation directed at public services inequities.

A. Background: In 1972 the Fifth Circuit handed down the landmark decision of *Hawkins v. Town of Shaw* (416 F.2d 1171 (1972). In that case, the court held that Shaw, Mississippi, was in violation of the equal protection guarantee of the Fourteenth Amendment to the U.S. Constitution because it was discriminating in the provision of a variety of public services against black residents in favor of white residents. The town was ordered over a three-year period (by 1976) to provide extensive improvements in the black neighborhoods, representing more than a one-million dollar investment. These included: installation of new street lights; additions to the water and sewer systems; installation of new fire hydrants and pavement for the streets.

Judge Wisdom in his concurring opinion heralded *Shaw* as a landmark decision, stating: "By our decision in this case, we recognize the right of every citizen regardless of race to equal municipal services." Since that time a number of additional cases have been filed in Mississippi, Florida, Virginia and other states of the South that have resulted in similar decisions or in settlements guaranteeing similar remedies.[3] Additional suits have been filed in other sections of the country but with mixed success.[4] But litigation efforts have been limited and the full potential of *Shaw* remains unrealized.

Among those groups that have brought or plan to bring *Shaw*-type cases are: the NAACP Legal Defense Fund (LDF), the Mexican-American Legal Defense and Educational Fund (MALDEF), the Lawyers' Committee for Civil Rights Under Law (LCCRUL) and individual attorneys in states such as Texas, Indiana and Virginia. These groups are bringing cases based on the *Shaw* model of racial discrimination, as well as cases based on other federal and state law provisions regulating utilities, water districts and other entities responsible for the delivery of services. Additional approaches involve challenges to the drawing of district boundaries in a discriminatory fashion; challenges to the manner in which the officials responsible for discriminatory resource allocations are elected and suits based on the non-discrimination provisions of the federal general revenue sharing law.

To date, these efforts have progressed in a relatively unco-ordinated fashion and have lacked any mechanism to screen systematically the most promising factual and/or legal settings. The overall effort has suffered from serious gaps in legal and factual research that have confined it to small-town settings where service denials are visually identifiable. Little or no attention has been given to underlying systemic problems involving state and local government and local finance law. And, finally, the lessons from the research and analyses that have been completed have not been made available to policymakers or experts in other fields.

B. The Proposal: The center proposed herein will consist of a small central staff (an experienced attorney aided by an advocate planner and consultants from related fields, plus administrative and secretarial support), assisted by an advisory committee (not to exceed 15 persons) composed of representatives of organizations that are litigating in the field or that have resources that litigants can draw upon. For example, the Advisory Committee will include representatives of MALDEF, LDF and LCCRUL as well as representatives from resource organizations, such as advocacy planning groups, urban research centers and community groups. In addition to its full-time staff, the center will draw upon students and volunteer attorneys.

The center will serve lawyers, community groups and policymakers. Its primary focus will be the development of systematic procedures for the identification and selection of factual situations appropriate for *Shaw* and related types of litigation and the conduct of research on legal theories appropriate to such cases. In regard to the latter, the center will conduct a systematic analysis of state constitutions and laws, municipal ordinances, formal regulations and other state and local sources for defining the general obligations of the state, of lesser jurisdictions and of those public and private entities that either refuse to provide services or that provide them in an inadequate fashion. As a corollary to these activities, the center will also collect and disseminate documents and writings bearing on the issue of public service equalization (whether from a legal or other point of view); conduct briefings and conferences to disseminate research data, to train attorneys and researchers and to develop litigation strategies; prepare

[3] See, for example, *Selmont Improvement Ass'n. v. Dallas County Com'n.* 339 F. Supp. 477 (S.D. Ala. 1972), a case involving the improvement of roads in the black community, and *Harris v. Town of Itta Bena* (N.D. Miss., Greenville D.V., CA No. GC67-56-S, a companion cast to *Shaw* that was settled in 1973).

[4] See, for example, *Beal v. Lindsay* 468 F. 2d 287 (2d Cir. 1972) where the court denied plaintiffs relief on a claim that the park in their neighborhood was not adequately maintained; *Citizens for Underground Equality v. City of Seattle*, 492 P. 2d 1071 (Wash. 1972) denying relief to poor property owners who, although forced to pay taxes, were unable to generate their own revenues for underground utilities; and *Fire v. City of Winner*, 352 F. Supp. 925 (1972) denying relief to Indians complaining of inferior street paving, sidewalks and sewerage facilities because "any difference . . . in the quality of such improvements stems primarily from the difference in the respective landowner's willingness to pay for the property improvements."

amicus briefs in support of those lawsuits deemed to have the greatest potential in advancing key legal theories; and assist client groups who have been invited to provide legislative testimony.

Although the primary focus of the Center will be on legal tactics for achieving reform, and particularly on the expansion of legal inquiry and scholarship in the field of public service equalization, its staff will also work closely with state legislatures and with civic groups seeking to achieve legislative reform, and will make its work product broadly available to academic institutions and to the press. Such cooperation will be facilitated by the fact that the evidence necessary to sustain major legal challenges in this field is similar to the facts that must be amassed by policy-makers in the evolution of new legislation.

The discussions conducted during and subsequent to the Trinity Conference suggest the following broad areas of legal and factual research as principal concerns of the center:

I. Legal – Among the questions to be addressed are the following: What grounds for federal equal protection challenges exist after the U.S. Supreme Court's decision in *Rodriguez v. San Antonio Independent School District?* That decision held that education and other social services are not "fundamental" under the U.S. Constitution and hence do not require strict standards of non-discrimination, and that some discrimination against poverty groups (as opposed to racial groups) is tolerable. It also warned against federal court interference in matters of local government and local finance. The center will want to explore the application of equal protection theories where public services are totally denied to poverty groups or where poverty lines correspond strictly to district lines (a situation not existing in *Rodriguez*). It will also want to explore challenges where the system for the delivery of services is "irrational" in addition to discriminatory.

- What federal due process theories are available for challenging the termination or denial of services? In Texas, the case of *Jimenez v. Hidalgo County Water Improvement District No. 2,* No. 73-3557 (5th Cir. 1974) bases a challenge to the removal of poor *colonias* areas from WCID's (water control and improvement districts) on the due process clause. Are such grounds available in other situations of denial; if so, under what circumstances?

- What federal statutory grounds could form the basis for service delivery discrimination challenges? Limited reliance has been placed to date on general revenue sharing legislation; what other grant legislation provides a similar basis? (The environmental protection laws should be an immediate area of inquiry.)

- What state constitutional grounds exist?* Provisions in state constitutions dealing with health, welfare and public safety may provide grounds of greater weight than local government organization statutes for challenging deprivations in regard to water, sewers, public safety protection and other services (*e.g.*, a constitutional requirement that the state protect the public welfare may prevail over a state statute allowing municipalities to provide sanitary services through special assessments). Other state constitutional provisions, such as the ban on private legislation (*i.e.*, laws that benefit only a distinct locality or groups as opposed to all citizens), may also provide appropriate bases of relief. In addition, constitutional grounds may exist for broad challenges to certain aspects of local government finance.

- What state statutory and/or regulatory grounds are available?* State statutes dealing directly with the services in question, establishing the powers and responsibilities of the local governmental units responsible for delivering the services or dealing with related matters, such as planning or environmental protection, need to be explored as handles for challenges to the denial or unequal provision of public services. (In addition, state Freedom of Information statutes should be reviewed as a vehicle for collecting the data necessary to determine if a suit is appropriate.)

II. Factual – The primary problem in this area is the "assessment of the problem," that is, the identification and analysis of data that indicate those localities where service denials are the greatest or most subtle (*i.e.*, those denied the service are not even aware that others are being properly treated) and that show the characteristics of the populations affected. To date, no systematic effort has been made to identify those areas of the country where the inequities in the delivery of public services are the greatest or even to identify the overall dimensions of the problem nationally. (Only anecdotal material has been available which does not provide an adequate decision-making base for either litigation or legislation.) Litigators need access to demographers and planners who are familiar with the available data sources and capable of designing sampling or other assessment tools. A second priority for factual research applies to remedies. Litigators and others need assistance in the identification of established and judicially acceptable standards for service levels and in researching appropriate long-and-short-term remedies. For example, research should be conducted on the appropriateness of new state or federal laws conditioning local grants, revenue collection or service delivery authority on a commitment by the locality to insure a minimal level of services to all citizens. Similarly, attention should be given to opening up the political procedures by which allocation decisions are made to insure that those who suffer the greatest deprivations are given equal voice in the decision-making process.

The center itself will not have the resources or the institutional focus to work in depth on factual issues not directly related to litigation. Its chief role in this area will be as a catalyst, helping to identify the problems and stimulate activity by other organizations.

This proposal is for a five-year period. Public service equalization litigation is in an embryonic stage. It is the considered judgment of the project sponsors that funding for a lesser period would not give the center adequate time within which to define its functions and to develop its audience. Unlike other areas of social reform, the constituents of the movement are not presently linked in a coalition or even in loosely coordinated communication. The Center will be carving out new territory with few established models to rely on.

*It is the consensus of all those contacted in connection with the preparation of this proposal that little or no research has been completed in regard to state constitutional and statutory grounds for public service equalization litigation. In view of the Supreme Court's current retrenchment on the Fourteenth Amendment as a vehicle for insuring equality, particularly as articulated in the *Rodriguez* case, state law concepts should receive immediate attention.

Appendix A

DOCUMENTARY RESOURCES AVAILABLE FOR RECORDING AND EVALUATING DISPARITIES IN THE PROVISION OF MUNICIPAL FACILITIES

By Yale Rabin

The development of factual evidence to document disparities in municipal facilities is generally a three-stage process. The first stage, undertaken prior to the filing of litigation, consists of the gathering of information derived from the observations of local residents, inspections by technical experts and the accumulation of descriptive data from readily accessible public records and documents. The second stage, which begins after the filing of the litigation, primarily consists of eliciting information from the defendants through the process of discovery. Analysis of the data and its transformation into forms suitable for presentation to the court comprise the third stage. The effectiveness of all three stages is considerably enhanced by a general familiarity with the types of relevant documents and records customarily kept and the sources from which they are available.

The resources outlined below are primarily those that enable a quantitative and qualitative assessment of disparities in the provision of municipal facilities. The purpose here is to list those resources that are most useful and ordinarily available, not to cite every resource that might be used. The outline does not include resources related to administrative responsibilities and procedures, historical development, and financial expenditures and sources. These aspects of the development of evidence are dealt with in *A Manual for Lawyers on Litigation for Equalization of Municipal Services*, by Jonathan Shapiro, pages 50-51 and 114-138.

PRE-LITIGATION RESOURCES

Base Maps: Where possible, an official map should be obtained showing streets, corporate boundaries, and major physical features such as streams and other bodies of water. Maps which show streets as a double line are preferable to those using a single line because the space between the double lines permits the recording of information on the condition of the street, such as drainage.

(Sources of such maps: city engineering department, city planning department, county engineering department, state highway department, chamber of commerce, stationery store and gasoline station.)

Attention should be given in selecting maps and recording of data on them to the possible future need for reproducing them. Maps from the last three sources listed above, while not official, provide valuable adjunct information. These often include the locations and names of schools, parks, playgrounds, libraries and fire stations.

Finally, care should be taken to verify all maps. Many maps fail to distinguish between existing conditions and officially approved proposals. An out-of-date map may portray facilities or physical features which have been altered or eliminated.

Plastic overlays are very useful, when used in conjunction with a reliable base map. On successive overlays, specific data can be indicated by the use of adhesive dots or tapes in various colors. For example, one such overlay might identify paved and unpaved streets; another might locate street lighting; still another might indicate the presence or absence of water supply mains or sewers. If the base map is shaded to show racial or economic characteristics of the population, the superimposition of see-through maps of facilities will serve as a dramatic demonstration of unequal services, if such should be the case. (These overlays are easily aligned with the base map by the use of corner markers on all maps.)

Aerial photographs: These show all buildings and other physical features. Photographs taken in winter, when the view is not obstructed by foliage, are preferable.

Sources: U.S. Department of Agriculture ASCS offices, city or county planning departments.

USDA aerial photographs are available for every predominantly agricultural county in the country. Appropriate photographs must be identified by code number at the local county ASCS office, and then ordered from regional Department of Agriculture offices. The photographic prints are approximately 24 inches square.

Some city planning departments have for sale aerial photographs which can be reproduced by the ozalid (blueprint) process. These are generally of larger scale than the USDA photographs and, because of the paper used, are less durable. However, these can more readily be used to superimpose information in transparent colors than can photographic prints. It is most helpful if aerial photographs and base maps can be obtained in the same scales.

Census data: The level of detail provided by U.S. Census reports will vary with the size and classification of the subject municipality. For small towns, data may be available only for the town as a whole; for larger places, by census tract; and for major cities, by individual block. Within these limits, the reports will provide information on distribution of population by race or ethnic group, and numbers of dwellings (by race of occupants) not connected to a sewer or public water supply. Sources: U.S. Government Printing Office, U.S. Government Printing Office bookstores and libraries.

In some instances more detailed data than is provided in published Census reports can be purchased from the Central User's Service of the U.S. Census Bureau, Washington, D.C.

Comprehensive plans: These are usually produced in municipalities that have had the prior need to establish eligibility under one or more HUD programs. For municipal equalization litigation, the most useful information in the comprehensive plan is to be found in the analysis of local conditions by neighborhood. This analysis (required for HUD Workable Program eligibility) will generally include maps illustrating: distribution of population by race and income, distribution of housing by quality, extent and quality of the water supply system, the locations of unpaved streets and the locations of schools, libraries, parks, playgrounds, fire stations and police stations. Sources: city planning commission, libraries and HUD regional or area office.

These plans, while containing useful indications of disparities in facilities, are seldom up to date, and require verification by survey and comparison to other data sources. Also of value in the comprehensive plan are the standards set forth against which the adequacy of some municipal facilities, such as schools, parks, libraries and playgrounds can be judged.

Codes and Ordinances: Officially adopted codes will contain standards against which the adequacy of some municipal facilities can be measured. These include the building code, health code and fire safety code. Additional information on fire safety may be obtained from state or national fire underwriters' codes and ratings. A zoning ordinance in combination with its accompany-

ing map will provide the basis for comparing treatment of white and minority residential areas with respect to land-use regulation.

RESOURCES ACCESSIBLE THROUGH DISCOVERY

Municipal facilities maps: Most local governments maintain, as part of normal operations, maps of water supply systems, storm drainage systems, and sanitary sewerage systems. The information contained on these maps will include the location and size of each line, and the locations and capacities of support facilities such as storage tanks, wells, pumps, inlets, and treatment centers. Water system maps will also customarily include the locations of fire hydrants. Either the local government or the utility company will usually maintain maps showing the locations of street lights which identify the fixtures by type if more than one type of fixture is in use.

General information maps: Information relevant to the evaluation of municipal facilities and services is also to be found on maps illustrating: growth of the municipality by annexation, land-use, dimensions of legal rights-of-way, and classification of streets and roads. Street classification consists of designations of streets according to intensity of use as arterial, collector, local and alley. Where such designations exist, it is not uncommon to find that improvements customarily provided by assessment are paid for out of general revenues on streets with high intensity designations.

Special studies: These, as their name implies, are infrequently available, but not to be overlooked. Included here are evaluations and analyses of individual municipal facility systems often undertaken by specialized consultants and supported by state or federal funds. The reports of such studies may contain detailed descriptions of disparities which might otherwise not be revealed.

Appendix B

COPY OF COURT ORDER IN *HAWKINS V. TOWN OF SHAW*

ANDREW HAWKINS, et al., Plaintiffs, v. TOWN OF SHAW, MISSISSIPPI, et al., Defendants. Civil Action No. DC 6737 in the United States District Court for the Northern District of Mississippi, Delta Division.

In accordance with the mandate of the United States Court of Appeals for the Fifth Circuit, this Court on July 17, 1972 entered an order requiring the defendant Town of Shaw, Mississippi, to formulate and file "a plan of equalization of all municipal services to place same on a parity between white neighborhoods and black neighborhoods, and a time schedule for each aspect of such equalization program." The Court further ordered plaintiffs to file a response to defendants' proposed plan of equalization. On or about October 12, 1972 defendants filed their plan and on or about January 5, 1973 plaintiffs filed their response. Thereafter the parties, through their attorneys and with the assistance of their experts (engineers and city planners), conferred at length and agreed to a plan of equalization.

It is the opinion and judgment of the Court that the plan of equalization formulated by the parties will eliminate the disparities between the provision of municipal services in white and black communities of Shaw, Mississippi, satisfies constitutional requirements and accordingly should be approved and adopted by the Court. It is therefore, hereby ORDERED:

I

MUNICIPAL SERVICES TO BE IMPROVED[1]

1. Defendants shall make the following improvements, and/or additions to the municipal services provided in the black neighborhoods of Shaw, Mississippi:

A. Water Distribution. New water mains, no less than six inches in diameter and with cut-off valves at all cross-connections shall be installed at each location specified on the map attached hereto as "exhibit A."

B. Fire Protection. A fire hydrant shall be installed at or near each point specified on the map attached hereto as "exhibit A."

C. Street Lights. A new street light, of a quality no less than "medium intensity mercury vapor," shall be installed at each location specified on the map attached hereto as "exhibit A."

D. Sanitary Sewer System. Service shall be provided to both Woodlawn and Kentucky Streets between Highway 61 and Bolivar Street.

E. Paving.

a) Each of the following streets shall be paved to the width specified:

[There follows a list of 36 streets, here omitted.]

b) All streets scheduled above for a paved right-of-way of more than 12' in width shall be paved with a minimum stabilized base thickness of 6" and surfaced with a minimum of 1-½" hot plant mix asphalt; all streets scheduled above for a paved right-of-way of 12' or less in width shall be paved and surfaced with no less than 6" reinforced concrete.

F. Storm Water Drainage.

a) The following primary storm water drainage grades and ditches shall be constructed:

i) The ditch along the entire length of the western side of Railroad Avenue shall be dredged and graded to drain into Silver Bayou near the intersection of Railroad Avenue and Canal Street. All other street drainage ditches located west of Gale Street and north or east of Silver Bayou shall be graded to drain into the Railroad Avenue ditch;

[There follow orders for dredging and grading of six other ditches, here omitted.]

b) It is expected that defendants will be required to obtain permits from either the Illinois Central Railroad or the State Highway Department for the construction of three of the above listed primary grades and ditches; and defendants shall forthwith make application for such permits and shall undertake such other steps as may be necessary to assure the construction of said primary grades and ditches.

[1] The improvements ordered relating to water distribution, fire protection, street lights and the sanitary sewer system acknowledge improvements made by the Town from the date of trial through the present. Such improvements are set forth in defendants' October 12, 1972 report to the Court.

c) The pavement surface of each street scheduled for a width of 16' or more shall be raised above present elevation and new ditches, graded consistently with the primary grades recorded in paragraph "F(a)," above, shall be constructed along both sides of each street in such a manner as to assure drainage away from adjacent housing; each street scheduled for a paving width of less than 16' shall be drained of storm water by the construction of an inverted grade (3/8" per foot across), along the center line of the street in such a manner as to assure drainage away from adjacent housing.

d) Storm water drainage ditches, graded consistently with the primary grades recorded in paragraph "F(a)" above, shall be constructed along both sides of each street which is presently without such drainage ditches.

e) All storm water drainage ditches throughout the black communities of Shaw shall be cleaned and seeded and regraded consistently with the primary grades recorded in paragraph "F(a)" above. Pipe culverts shall be provided at all driveways and all intersections to assure a fully connected sub-area drainage network.

2. Defendants shall continue efforts to form and participate in the Porters Bayou Drainage District project summarized on pp. 6-7 of their Report to the Court (plan for equalization) dated October 12, 1972.

3. Defendants shall contract for a study to be performed by engineers agreeable to all parties which shall determine the feasibility of a project to enlarge Silver Bayou and construct one or two storm water drainage lakes as proposed by plaintiffs' engineer in his report dated December 30, 1972 and filed with the Court on or about January 6, 1973.

II
TIME SCHEDULE

4. Defendants shall complete the foregoing improvements and/or additions to the municipal services provided in the black neighborhoods of Shaw according to the following schedule:[2]

A. Installation of street lights shall be completed no later than March 15, 1974;

B. Additions to the water distribution and sanitary sewer systems and the installation of fire hydrants shall be completed no later than July 15, 1975;

C. The improvements recorded in paragraphs "F(a)," "F(d)" and "F(e)" shall be completed no later than September 15, 1975;

D. All remaining improvements and/or additions shall be completed no later than June 15, 1976.

5. The Court adopts the agreement of the parties that the foregoing time schedule for the plan of equalization is in all respects reasonable. Should defendants petition the Court for a modification they shall demonstrate upon hearing: a) all steps taken to assure the completion of the project by the specified deadline; and b) the circumstances which make it impossible to meet the deadline; and c) that any proposed new deadline represents the earliest practicable date for the completion of the improvements.

III
FINANCING

6. All monies received by the Town of Shaw deriving from 31 U.S.C. § 1221 ("Revenue Sharing"), shall be applied to or retained for the projects of municipal equalization required by this order until all such projects are completed.

7. Defendants are hereby enjoined from constructing any new or repairing or improving any existing municipal service in the white residential neighborhoods of Shaw, except for emergency or routine repairs (*e.g.*, repair of ruptured water line or replacement of street light bulbs), until all of the projects of equalization required by this order are completed.

8. No less than 85% of all cash surpluses on hand or realized through June, 1976, and all bonds and securities owned by the Town shall be applied to the projects of municipal equalization required by this order. All funds received by the Town of Shaw, not restricted by law for specific use, and not required for salaries and the day-to-day operation of the Town, shall be applied to the projects of municipal equalization required by this order.

9. The Court is advised by the parties that the foregoing provisions should result in the availability of adequate funds to complete all projects required by this order; accordingly, the propriety or necessity for further relief in this regard will not be considered by the Court at this time.

IV
PERIODIC REPORTS

10. On or about March 15, 1974 and August 30, 1974, and on the same dates annually thereafter, defendants shall file with the clerk of the Court and serve upon counsel for plaintiffs a report which set forth all steps taken to implement, and the status of, each facet of the equalization program required by paragraphs 1-3 of order.

11. The Court retains jurisdiction over this cause for the purpose of entering such further orders as may appear necessary or proper.

12. All costs are taxed against defendants.

ORDERED, this 29th day of June, 1973.

WILLIAM C. KEADY

United States District Judge

AGREED AS TO FORM AND CONTENT: MELWYN R. LEVENTHAL, Anderson, Banks, Nichols & Leventhal; JACK GREENBERG and JONATHAN SHAPIRO, Counsel for Plaintiffs; ANCIL L. COX, JR., Cox & Moore, Counsel for Defendants.

[2] All steps preliminary to the actual construction of the improvements (*e.g.*, preparation of construction plans and specifications where necessary, advertisements for construction bids, selection of contractors, completion of financial arrangements, obtaining necessary rights of way and construction easements), shall be taken by defendants according to a schedule of their own choosing but which assures that the over-all deadlines established by this paragraph are met.

Appendix C

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Appendix D

NON-LEGAL ORGANIZATIONS ACTIVE IN PUBLIC SERVICE EQUALIZATION

Organization	Address	Contact Person
Advisory Commission on Intergovernmental Relations	726 Jackson Place, N.W. Washington, D.C. (202) 382-3223	John Callahan
U.S. Commission on Civil Rights	1121 Vermont Ave., N.W. Washington, D.C. (202) 254-8130	John Buggs
Urban Institute	2100 M Street, N.W. Washington, D.C. 20036 (202) 223-1950	
UCLA - Institute of Government and Public Affairs	School of Law Los Angeles, California (213) 825-1334	Donald G. Hagman (Professor of Law)
Department of Urban Studies & Planning	Massachusetts Institute of Technology Bldg. 7, Room 338 77 Mass. Avenue Cambridge, Mass. 02139 (617) 864-6900	Larry Susskind (Professor)
National Academy of Public Administrators	1225 Conn., Ave., N.W. Washington, D.C. 20036	Charles Warren